Supreme Court, U.S.
FILED
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No. _____

In The
Supreme Court of the United States

BARBARA SCARBOROUGH, individually and on behalf of decedent William A. Scarborough; RHONDA SCARBOROUGH HALTERLEIN, Individually and on behalf of decedent William A. Scarborough; WILLIAM SCARBOROUGH, JR., Individually and on behalf of decedent, William A. Scarborough,

Petitioners,

VERSUS

CLEMCO INDUSTRIES INC., also known as Clemco-Clemintina Ltd.; PULMOSAN SAFETY EQUIPMENT COMPANY; CENTURY INDEMNITY COMPANY, as successor to CCI Insurance Company as successor to Insurance Company of North America; AMERICAN HOME ASSURANCE CO., and INTERSTATE INSURANCE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether survivors of a Jones Act seaman can recover non-pecuniary damages against tort feasors who are not his employer and who owe no warranty of seaworthiness.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fifth Circuit.

The petitioners herein and appellants below are plaintiffs BARBARA SCARBOROUGH, individually and on behalf of the decedent, William A. Scarborough; RHONDA SCARBOROUGH HALTERLEIN, individually and on behalf of the decedent, William A. Scarborough; WILLIAM SCARBOROUGH, JR., individually and on behalf of the decedent, William A. Scarborough.

The appellees below and respondents here are PULMOSAN SAFETY EQUIPMENT COMPANY; CLEMCO INDUSTRIES, INC.; CENTURY INDEMNITY COMPANY, and INTERSTATE INSURANCE COMPANY.

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 391 F.3d 660 and can be found in the Appendix at App. 1. The District Court opinion in *Scarborough II* is reported at 264 F.Supp.2d at 437 and can be found in the Appendix at App. 17. The District Court "Final Judgment" of June 18, 1981 in *Scarborough I* can be found in the Appendix at App. 40. The Minute Entry of December 22, 1981 in *Scarborough I* can be found in the Appendix at App. 49.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued an opinion on November 18, 2004. Pursuant to Supreme Court Rule 13.1, this petition is timely, having been filed within 90 days of entry of the opinion.

Jurisdiction is proper over this writ pursuant to 28 U.S.C. § 1254(1), because it is an appeal from a final decision of the United States Court of Appeals and is filed within 90 days of that decision.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions involved in this case are set forth in the Appendix to the Petition: Federal Employers' Liability Act, 45 U.S.C. § 51; Jones Act, 46 U.S.C. § 688; U.S.C. § 1254, which can be found in the Appendix at App. 64-66.

Louisiana Civil Code Articles 2315.1 and 2315.2 provide:

Art. 2315.1 Survival action

A. If a person who has been injured by an offense or quasi-offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi-offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving; and

(3) The surviving bother and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving.

B. In addition, the right to recover all damages for injury to the decedent, his property or otherwise, caused by the offense or quasi offense, may be urged by the decedent's succession representative in the absence of any class of beneficiary set out in the preceding Paragraph.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", and "mother", include both a child, brother, sister, father, and mother, by adoption respectively.

Added by Acts 1986, No. 211 § 2. Amended by Acts 1987, No. 675, § 1.

Art. 2315.2 Wrongful death action

A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children

(2) The surviving father and mother of the deceased, or either or them if he left no spouse or child surviving; and

(3) The surviving brothers and sisters of the deceased, or either or them if he left no spouse, child or parent surviving.

B. The right of action granted by this Article prescribes one year from the death of the deceased.

C. The right of action granted by this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", and "mother", include both a child, brother, sister, father, and mother, by adoption respectively.

Added by Acts 1986, No. 211 § 2.

STATEMENT OF THE CASE

The decedent, William A. Scarborough, was the husband of petitioner, Barbara Scarborough, and father of petitioners Rhonda Halterlein and William Scarborough, Jr. Mr. Scarborough died on March 21, 2002. The cause of death was respiratory failure resultant from silicosis. For many years Mr. Scarborough was employed as a sandblaster, primarily working on permanent platforms in the Gulf of Mexico. The sandblasting equipment (hoses, pots, etc.) was located on various vessels operated by his employers, which also provided living quarters.

The instant suit was brought against land-based manufacturers of safety hoods or masks used in sandblasting; Clemco Industries and Pulmosan Safety Equipment Co. and their underwriters. The complaint was brought " . . . pursuant to the Louisiana General Tort Law, survival and wrongful death actions pursuant to La. C.C. 2315.1 and 2315.2, diversity of citizenship and jurisdictional amount and the Louisiana Direct Action statute." (Original Complaint, App. 67-68).

During his lifetime, Mr. Scarborough had brought a civil action against the current defendants under Louisiana law, as well as against his former employers under Maritime Law and the Jones Act. (46 U.S.C. § 688) (App. 65). He was successful on both counts, and received an award in the earlier litigation. (*Scarborough I*). The instant suit (*Scarborough II*) asserts the claims of his survivors in an action in wrongful death, which claim had not been disposed of in the earlier litigation. (Final Judgment App. 40).

Motions and cross motions were brought by all parties which were viewed as motions to dismiss/alternative

motions for summary judgment. On May 15, 2003, the lower court rendered an Order and Reasons reported in *Scarborough v. Clemco Industries*, 264 F.Supp.2d 437 (E.D.La. 2003) (App. 17).

In that decision, the district court concluded that:

> "(U)nder the uniform rule expressed in *Miles*, Plaintiffs cannot supplement their claim of wrongful death with state law remedies. Non-pecuniary damages are not available." 264 F.Supp.2d at 447 (App. 17).

The suit was not dismissed at that time because burial costs were still outstanding. Later, a settlement was reached with the defendants, whereby burial costs were paid, which was the only pecuniary claim still extant. A dispositive judgment was rendered on October 1, 2003, dismissing all of the claims asserted by the petitioners. (App. 62). After oral argument on October 7, 2004, the Court of Appeals for the Fifth Circuit affirmed the lower court decisions at 391 F.3d 660 (5th Cir. 11/18/2004). (App. 1).

STATEMENT OF RELEVANT FACTS

The decedent, William A. Scarborough, died on March 21, 2002. The cause of death was respiratory failure resultant from silicosis. The instant proceedings were brought solely against land-based manufacturers, Clemco Industries and Pulmosan Safety Equipment Co. and certain of their underwriters. These defendants manufactured safety hoods or masks used in the sandblasting industry. The safety devices could be used in blasting operations on land or at sea. In this case (designated

Scarborough II), no claim was brought against the Jones Act employers of Mr. Scarborough.

An earlier civil action had been brought by Mr. Scarborough prior to his death, which had been lodged in the United States District Court for the Eastern District of Louisiana, Honorable Frederick J.R. Heebe presiding, bearing Civil Action Number 77-2523. (Designated *Scarborough I*). The earlier case asserted Louisiana tort claims against Pulmosan Safety Equipment Corp. and Clemco, Inc. as manufacturers of certain defective sandblasting hoods. Coating Specialists, Inc. and Land & Marine Applicators were joined as the Jones Act employers of Mr. Scarborough. At trial, the jury concluded that Mr. Scarborough was a Jones Act seaman. Damages were assessed at 60% against the Jones Act defendants, and 40% against the manufacturers.

After a trial on the merits, a final judgment was rendered in *Scarborough I* on June 18, 1981 in favor of Mr. Scarborough. That judgment read as follows:

> "IT IS ORDERED ADJUDGED AND DECREED THAT THERE BE JUDGMENT HEREIN IN THE FAVOR OF THE PLAINTIFF WILLIAM A. SCARBOROUGH AND AGAINST DEFENDANTS, COATING SPECIALIST INC., LAND & MARINE APPLICATORS INC., PULMOSAN SAFETY EQUIPMENT CORPORATION AND CLEMCO INC., JOINTLY AND IN SOLIDO, IN THE FULL SUM OF SIX HUNDRED FIFTY THOUSAND ($650,000.00) DOLLARS, TOGETHER WITH LEGAL INTEREST THEREON FROM DATE OF THIS JUDGMENT AS TO 60% OF IT AND FROM DATE OF JUDICIAL DEMAND AS TO 40% OF IT AND ALL COSTS OF THESE PROCEEDINGS." (App. 42).

It should be noted that for the most part Mr. Scarborough performed his labors while on permanent oil platforms located in the Gulf of Mexico. The vessel on which he was a crew member carried the sandblasting pots and compressors and served as living quarters. Although he did incidentally perform some seaman related tasks, his primary occupation was blasting while stationed on these permanent structures. Excerpts from the trial transcript are illustrative:

EXCERPT FROM TESTIMONY OF MR. SCARBOROUGH:

"Q. The sandblasting was done on the rigs themselves, is that rights?

A. Yes, sir.

Q. You had to get on the rig to sandblast?

A. Yes, sir, unless we were working around the edge of the water line, we occasionally blasted off of the boat.

Q. But most of the work was done on the rigs?

A. The majority, yes. (App. 75).

. . .

Q. These boats that you were working on were, the mission of those vessels were to support the sandblasting activity that was gong on on the rigs, isn't that correct?

A. Yes, everything came off of the boat, right, yes, sir." (App. 77).

EXCERPT FROM THE TESTIMONY OF JOHN WILLIAM LOERWALD:[1]

"Q. Sandblasters, engaged in the offshore sandblasting activity, didn't they go out on vessels and work on rigs from the vessels or on the rigs themselves and live aboard the vessels as they worked offshore?

A. They lived aboard the vessels, but they worked on the structures. When you are sandblasting a piece of steel, you cannot be any further than eighteen inches away from the steel, so it would be pretty hard to blast structure from the boat. (App. 77-78).

. . .

A. Well, the sandblasters didn't work on the boat, they worked on the structure." (App. 78).

The complaint in the case under review (*Scarborough II*) was filed solely under Louisiana law, in diversity. The applicants have not brought a claim under the Jones Act for the decedent's wrongful death, and have not sued the shipowners for the decedent's demise. In fact, plaintiffs have conceded that "in recognition of intervening Louisiana law precluding joint and several liability for defendants assigned percentages of fault, plaintiffs now seek only 40% of the current damages, specifically those which are attributable to the fault of Pulmosan and Clemco." 264 F.Supp. at 446. (App. 36). Plaintiffs also " . . . concede that their survival action is properly dismissed" because Mr.

[1] The CEO of defendant, Land & Marine Applicators, a Jones Act employer.

Scarborough's personal pain and suffering and other pecuniary claims prior to death "were previously merged into the satisfied 1981 Judgment." *Id.* at 447. (App. 36).

Under the law of Louisiana, the claim for wrongful death is a separate and independent cause of action, which does not accrue until the moment of death. *Walls v. American Optical Corp.*, 740 So.2d 1262, 1270 (La. 1999); *Landry v. Avondale Industries*, 877 So.2d 970, 972 (La. 2004). The claim presented does not rely upon nor does it assert Mr. Scarborough's status as a seaman in support of the current suit. The claim is limited to damages for wrongful death against the non-employer manufacturers. Because the burial claims have been settled, petitioners now are seeking only non-pecuniary damages in this wrongful death action.

REASONS FOR GRANTING THE WRIT

The question of whether the decision in *Miles v. Apex Marine*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), prohibits recovery of non-pecuniary damages by a seaman against all tortfeasors, even those that are not his employer, has been considered by many federal district courts. Courts in Louisiana, Texas, Washington, Illinois, Michigan, New York and West Virginia have refused to prohibit such recovery. Please see listing, page 16, *infra*. A Louisiana state court has reached a similar conclusion.

The Court of Appeals for the Fifth Circuit has reached a contrary conclusion, barring recovery of non-pecuniary damages even against tortfeasors who are not employers of the Jones Act seaman. 391 F.3d 660. A majority of the

federal district courts located in Louisiana had earlier reached a similar result. Please see listing, page 16, *infra*.

Therefore, as observed by the appellate court, the district courts in the circuit were split on the issue. Please see 391 F.3d at 667 (App. 13).

The Fifth Circuit below held that, because "The genesis of appellants' claims are maritime through and through, *Miles* plainly limits recovery to non-pecuniary damages. We will not retreat from the bright line directive of *Miles*." 391 F.3d at 668. (App. 16).

Only this Honorable Court has the power to resolve the issue and to clarify the "bright line" perceived by the court below. An important question of federal admiralty law is presented. It would be of great help to the bench and bar to determine the accuracy of the conclusion of the Fifth Circuit that:

> "The *Miles* opinion is concerned with uniformity in the damages recoverable by a Jones Act seaman and his survivors, not with uniformity of the types of damages to which various defendants are subjected." *Id.* at 668. (App. 16).

ARGUMENT

1) A SHORT HISTORY OF THE JONES ACT

This esteemed court certainly does not need a lecture on the statutory history of the Jones Act, 46 U.S.C. § 688. (App. 65). To simply review, under *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903), it had been held early on that a seaman did not have a cause of action against his employer for injuries caused by the negligence

of the master or crew. This holding was legislatively overruled by the Jones Act, 46 U.S.C. § 688 (App. 65), which, through incorporation of the Federal Employers Liability Act, 45 U.S.C. § 51 (App. 64), specifically created an action in favor of the seaman, and eliminated defenses such as the fellow servant doctrine, contributory negligence and assumption of risk. Non-pecuniary damages were not recoverable under the Jones Act because of restrictions in the FELA. *The Osceola,* incidentally, had created a seaman's claim for unseaworthiness, which was not changed by the passage of the Jones Act.

Later, Congress again entered the admiralty field by enacting the Death on the High Seas Act (DOHSA) which created a wrongful death action on behalf of dependents of any person killed through the tortious conduct of another on navigable waters, three miles from the shore of any state. 46 U.S.C. § 761 (1988). The Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) filled the gap in the legislative scheme by creating a similar wrongful death action for longshoreman killed within the three-mile limit. *Id.* at 747.

Traditionally, seamen were considered to be wards of the admiralty court, and were treated with special solicitude by admiralty judges. Hon. John R. Brown, *Admiralty Judges; Flotsam on the Sea of Maritime Law?* 24 J.Mar.L.&Com. 249 at 283-284. Despite the concept of "special solicitude," the decision below restricts the right of a seaman against a non-employer in the name of uniformity. The appellate court concluded that the decision of this Court in *Miles v. Apex Marine*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), prohibited recovery of non-pecuniary damages against a non-employer tortfeasor,

even though the Jones Act only created a new remedy against the actual employer of the seaman.

If there is continuing viability to the "special solicitude" extended to "wards of the court" by the admiralty law, it is difficult to support a result which makes a seaman's claim against non-employer tortfeasors more restrictive than the recovery allowed against any maritime tortfeasor in favor of a longshoreman, a passenger, or even somebody killed on a jet ski. Philosophically, petitioners cannot fathom why many lower courts have expanded the "uniformity" aspects of *Miles v. Apex Marine* so far as to restrict the rights of these "wards of the court" in claims against wrongdoers who are not subject to the provisions of the Jones Act or controlled by any other congressional mandate.

2. SHOULD *MILES V. APEX MARINE* BE EXTENDED TO FORECLOSE A SEAMAN'S RIGHT TO RECOVER NON-PECUNIARY DAMAGES IN A SUIT AGAINST A TORTFEASOR OTHER THAN HIS EMPLOYER

a. Why should a non-employer be given a free ride?

The facts of *Miles v. Apex Marine*[2] are straightforward. The decision denies a non-dependent mother recovery of damages under the general maritime law for loss of consortium against her son's Jones Act employer, in a case arising in territorial waters. No third party tortfeasor was

[2] 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

involved in the case.[3] The decedent's estate was also denied recovery of future wage loss, an issue not relevant here. Ultimately, the court held that there can be "no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Miles*, 498 U.S. at 33, 111 S.Ct. at 326. Because the death occurred in territorial waters, the court concluded that there now would be the benefit of uniformity in actions under the Jones Act, regardless of where the death occurred, whether or not brought under the Death on the High Seas Act. No comment was made relating to the right of a seaman or his survivors to recover against wrongdoers who were not his Jones Act employer.

This Honorable Court also restricted the recovery of the Jones Act seaman because it would be improper for the courts to "sanction more expansive remedies in a judicially created cause of action in which liability is without fault than congress has allowed in cases of death resulting from negligence." *Miles* 498 U.S. at 32, 111 S.Ct. at 326. Presumptively, the "judicially created" claim referred to is that for unseaworthiness, which does not lie against a non-employer, non-shipowner.

In Professor Robert Forces' article in 55 La.L.Rev. 745 (1995), the following observation was made at 752:[4]

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[3] Footnote 5, *Scarborough v. Clemco*, 391 F.3d at 668 (App. 11) indicates that not all of the defendants in *Miles* were Jones Act employers. The author of this brief was co-counsel in *Miles*. On the issues before the Court in *Miles*, only Jones Act employers or entities owing a warranty of seaworthiness were involved.

[4] Credit must be given for some of the thoughts presented in this Petition to the article of Robert Force. *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative*

(Continued on following page)

> "It is, therefore, reasonable to predict that *Miles* should have no effect on the recovery of pecuniary damages in maritime personal injury actions. Similarly, it should have no effect on those types of non-pecuniary damages, such as pain and suffering, that have long been accepted as appropriate in maritime cases."

There is a quid pro quo rationale for restricting recovery to pecuniary damages in a suit against a Jones Act employer. The Jones Act is, after all, a legislatively created remedy. Before the passage of the Jones Act, it was virtually impossible for a seaman to recover against his employer. As a result of the legislation, the seaman was allowed to sue his employer for negligence. There is also a strict liability claim, judicially created, for unseaworthiness under Maritime Law. This remedy is exclusive to seamen. Under the Jones Act, there is a reduced burden to show causation. General solicitude was extended to the seaman who could now recover against his employer. Thus, *vis a vis* a seaman's employer, it could be concluded that a trade off occurred through the Jones Act, similar to that which gave tort immunity in exchange for the liability without fault found in worker's compensation legislation schemes throughout the country. By incorporating the FELA (45 U.S.C. § 51) (App. 64) into the Jones Act, the restriction of recovery to only pecuniary damages against the actual employer was engrafted into the seaman's statute. From a policy point of view, therefore, *Miles v. Apex Marine* was correct to restrict recovery of non-pecuniaries in claims solely against the employer. The will

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intent" in Maritime Personal Injury Cases, Prof. Robert Force, 55 La.L.Rev. 745 (1995).

of Congress is being effectuated when Jones Act employers are defendants.

The *Miles* decision did not involve a non-employer, non-shipowner defendant. The issue that has troubled the lower courts is whether the uniformity principle extends to entities outside the Jones Act/unseaworthiness context. The issue is now presented directly in the case at bar, which is only against non-employers.

Notwithstanding the limited fact situation in *Miles*, a number of lower courts have expanded *Miles* to preclude recovery for non-pecuniary damages, even in a suit against a non-employer. A partial listing of such cases would include:

> *Thompson v. Cross Offshore Corp.*, 2001 WL 1297789 (E.D.La. 2001); *Mastrodonato v. Sea Mar, Inc.*, 2000 U.S. Dist. LEXIS 8293, 2000 WL 739284 (E.D.La. 2000) (J. McNamara); *Trident Marine, Inc. v. M/V ATTICOS*, 876 F.Supp. 832 (E.D.La. 1994); *Carnival Cruise Lines v. Red Fox Industries, Inc.*, 813 F.Supp. 1185 (E.D.La. 1993); *Ellender v. John E. Graham & Co.*, 821 F.Supp. 1136 (E.D.La. 1992).

Of course, the Fifth Circuit has now joined this group in the case *sub judice*.

On the other hand, the teaching of *Miles* is not so preeminently clear that there have not been courts which take a less expansive view of the case, arriving at an entirely different conclusion, allowing recovery of non-pecuniary damages against a non-employer defendant. A listing of cases which do not restrict recovery against non-employers would include:

> *Rebstock v. Sonat Offshore Drilling*, 764 F.Supp. 75 (E.D.La. 1991); *Verdin v. L&M Bo-Truc Rental, Inc.*, 1991 U.S. Dist. LEXIS 7057, 1992 AMC 93 (E.D.La. 1991); *Gerdes v. G&H Towing Co.*, 967 F.Supp. 943 (S.D.Tex. 1997); *Sugden v. Puget Sound Tug & Barge Co., a Division of Crowley Maritime Corp.*, 796 F.Supp. 455 (W.D.Wash. 1992); *Emery v. Rock Island Boatworks*, 847 F.Supp. 114 (C.D.Ill. 1994); *Mussa v. Cleveland Tankers*, 802 F.Supp. 84 (E.D.Mich. 1992) (related case to *Petition of Cleveland Tankers, Inc.*, 843 F.Supp. 1157 (E.D.Mich. 1994)); *In re Horizon Cruises Litigation*, 101 F.Supp.2d 204 (S.D.N.Y. 2000); *Stogner v. Central Boat Rentals Inc., et al.*, 326 F.Supp.2d 754 (E.D.La. 2004); *In re Consolidated Coal Co.*, 228 F.Supp.2d 764 (N.D.W.Va. 2001).

Thus, there is a significant difference of opinion as to the true meaning and intent of *Miles*. The resolution of this dichotomy rests exclusively with this Honorable Court. The confusion in the courts below can now be definitively resolved through the case at bar.

The less expansive view of *Miles* is well presented in the decision of *In the matter of: Denet Towing Service, Inc.*, 1999 U.S. Dist. LEXIS 805 (E.D.La. 1999). There, the district court held:

> "Because the Jones Act forecloses recovery for non-pecuniary loss in General Maritime Law cases only with respect to the relationship between a seaman and his employer, a seaman's status is relevant only in actions under the Jones Act or, after *Miles*, under the General Maritime Law against his employer." *Id.* at 10. (Emphasis added).

The basic thrust of Judge Lemmon's decision is that "it should make no difference whether the decedent was a seaman, a longshoreman, or a passenger" when a third party, non-employer tortfeasor is involved. *Id.*[5]

Analyses from these disparate courts are illustrative of the rationale of the less restrictive interpretation of *Miles v. Apex Marine*.

A Texas district court in *Gerdes v. G&H Towing Company*, 967 F.Supp. 943, 945 (S.D.Tex. 1997), in reviewing the disagreements among the district courts, made the following comment:

> "The Court respectfully disagrees with the courts holding that nonpecuniary damages are not recoverable against a nonemployer third party and finds their rush to uniformity unsettling. In matters of justice and fairness, uniformity cannot always be the ultimate goal. As this Court previously stated, 'any benefit that may result from achieving uniformity among laws designed to address completely different problems or benefit completely different classes of persons may well be outweighed by the damage caused by the loss of rights or remedies sacrificed at the altar of uniformity.' In this Court's opinion, rights and remedies are being sacrificed by courts who extend *Miles* beyond its holding for the sake of that ephemeral goal, uniformity in maritime law. This Court declines to join the sacrifice and holds that a family member of a Jones Act seaman may

[5] Of course, if the decision of the Fifth Circuit below stands, the cited cases will be effectively overruled. The Fifth Circuit has already eliminated consortium in a maritime claim by a seamen's spouse. *Michel v. Total Transportation Inc.*, 957 F.2d 186, 191 (5th Cir. 1992).

> recover nonpecuniary damages against a nonemployer third-party defendant on a products liability theory." (Citations omitted).

The analysis by the district judge in *Stogner v. Central Boat Rentals, Inc.*, 326 F.Supp.2d 754, 759 (E.D.La. 2004) was as follows:

> "Since statutory guidance does not exist regarding the restriction of damages in negligence suits against nonemployers and because liability is more difficult to prove in negligence actions under general maritime law, treating employers and nonemployers as equals does not necessarily weigh on the side of uniformity. Moreover, instead of lumping together employers and nonemployers under the guise of uniformity, remedies available under the general maritime law should be analyzed since the general maritime law, not the Jones Act, applies to a seaman's negligence action against a nonemployer. Accordingly, because a longshoreman or a passenger on a vessel can recover nonpecuniary damages under general maritime law, the seaman who brings a claim against a nonemployer under general maritime law should also be able to recover nonpecuniary damages."

In *Rebstock v. Sonat Offshore Drilling*, 764 F.Supp. 75, 76 (E.D.La. 1991), after concluding that *Miles v. Apex Marine* should not affect the right to consortium, the trial judge commented on uniformity by stating:

> "The uniformity sought by the *Miles v. Apex* Court is not affected by this court's ruling. *Miles v. Apex* sought to establish a uniform rule for seaman suing their employers. Seaman suing third parties were not considered by the Supreme Court. Indeed, to rule that the spouse of an

> injured seaman is not entitled to loss of consortium damages under the general maritime law of negligence would create an inconsistency between seamen and longshoremen. Under section 5(b) of the Longshore and Harbor Workers' Act, 33 U.S.C. sections 901-950, which permits a longshoreman to sue a nonemployer vessel owner for negligence, the spouse of the longshoreman is permitted to recover loss of consortium damages. *See* T. Schoenbaum, *Admiralty and Maritime Law*, section 6-10, at 221. Uniformity is best promoted by allowing a seaman to recover the same damages for negligence that a longshoreman may recover."

The trial court *In the Matter of Denet Towing*, 1999 U.S. Dist. LEXIS 8058, at 9, commented on *Guevara v. Maritime Overseas Corp.*, *supra.*, making the following observation:

> "The facial inapplicability of *Miles* to the present type of case has been recognized by the Fifth Circuit in *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1510 (5th Cir. 1995) (en banc). There, in the context of denying recovery of punitive damages for failure to pay maintenance and cure, the court noted that 'we simply need to ask if the "factual setting of the case" . . . is covered by a statute like the Jones Act.' *Id.* Absent an 'overlap' between the general maritime law and the Jones Act, there simply is no cause to invoke the *Miles* uniformity principle. *Id.* at 11. Consequently, this court declines to extend *Miles* to the facts of present case."

Despite acknowledging that the earlier principles for application of *Miles* formulated in *Guevara* "may not be met in this case,"[6] the Fifth Circuit nonetheless applied the restrictive view of *Miles* in the case below. Petitioners submit that, although the Jones Act was meant to enable claims of seamen against their employers, there is no historical precedent or legislative history to show that the Jones Act was intended by Congress to restrict recovery by seamen who are injured by tortfeasors other than their Jones Act employer or shipowners owing the warranty of seaworthiness.

The cases that refuse to foreclose a seaman's recovery against a non-employer are not voices crying in the wilderness. Such decisions have issued from the Eastern District of Louisiana, the Southern District of Texas, the Western District of Washington, the Central District of Illinois, the Southern District of New York, the Northern District of West Virginia, and the Eastern District of Michigan. It is apparent that the effort to ascertain the true scope of *Miles* has led to great confusion among the lower federal courts across the country.

The courts of Louisiana have also considered the issue. By the Lands Act, state law has been "federalized" on these artificial islands upon which Mr. Scarborough performed his work. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 421, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). A state appellate court has pointed out the distinction between a seaman as employee and a seaman as a claimant against a non-employer third party. In *Warren v. Sabine Towing & Transp. Co.*, 831 So.2d 517 (La.App. 3rd Cir. 2002), the

[6] 391 F.2d at 668, App. 15.

highest Louisiana intermediate appellate court to comment directly on the issue observed that:

> "In the instant case, Mr. Warren was clearly a Jones Act seaman for purposes of his employment with Sabine Towing. However, that is where the similarity with *Miles* ends. Mrs. Warren's cause of action for wrongful death damages under the Jones Act or the general maritime law for unseaworthiness was no longer extant after her settlement with Sabine Towing. All that remained after that settlement was a garden-variety wrongful death cause of action under the general maritime law for third-party fault for failure to warn. *Miles* did not explicitly address the remedies available under such circumstances, nor do we find that it addressed that issue implicitly. Thus, we do not find that *Miles* precludes the application of state-law wrongful death remedies, including nonpecuniary damages."[7] *Id.* at 536.

In that state case, as in this case under review, the claim being asserted was "a garden-variety wrongful death cause of action. . . ." In *Scarborough I*, the trial court concluded that the case against the manufacturers came under Louisiana law. Even if the case now should be deemed to be within the admiralty jurisdiction as to the two defendant-manufacturers, the claim is totally independent of and not regulated by the specific language or the apparent intent of the Jones Act. Because the contraction of the silicosis occurred for the most part on permanent platforms off the Louisiana Coast, the Death on the

[7] In the case at bar, with injury occurring over time, primarily on permanent structures within territorial waters or on the OCS, the relationship is even more tenuous.

High Seas Act should not apply. *Rodrigue v. Aetna C&S,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Thus, under the facts of the case at bar, Congress has **not** spoken directly to the question of what damages are recoverable by Mr. Scarborough, against non-employer parties, such as are now being sued by petitioners. The *Miles* decision does not directly address that issue. In *Miles*, the decedent was a traditional "blue water" seaman. The fact pattern in *Miles* is significantly different from the case now being presented. Only this Court can resolve the dilemma.

While the court below in *Scarborough II* found " . . . this rationale compelling in the abstract . . . ," it concluded that this reasoning " . . . cannot overcome the fact that in this case, the seed of all the decedent's cause of action against all defendants in *Scarborough I*, including his claims of vessel unseaworthiness emanated from the same nucleus of operative facts, specifically the inadequate equipment designed, manufactured and supplied by Pulmosan and Clemco." 264 F.Supp. at 446. (App. 35). In effect, by that reasoning, a Jones Act seaman is marked with the sign of Cain, and can never recover non-pecuniary damages against any tortfeasor of any description. Thus, if his Jones Act employer is innocent of fault, the seaman and his heirs are without recourse.

After the decision in *Miles v. Apex*, this Court decided *Yamaha Motor Corp. USA v. Calhoun*, 516 U.S. 119, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996), in which a young girl was killed in territorial waters, not subject to DOSHA, and non-pecuniary damages were allowed. Historically, maritime workers such as longshoremen had an action under General Maritime Law for injuries caused by the negligence of others, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406,

74 S.Ct. 202, 98 L.Ed. 143 (1953). Although *Sieracki*[8] seamen were eliminated by Congressional act, maritime workers still have the statutory right to sue vessel owners for injuries and death caused by the negligence of a vessel.[9] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b). Congress has also specifically preserved on behalf of maritime workers all other remedies for injuries caused by persons who are not their employers. 33 U.S.C. § 933.

Passengers who are neither seamen nor maritime workers also have a cause of action under General Maritime Law against those whose negligence or other tortious conduct causes injury. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959).

Therefore, unless *Miles* is to be extended to matters that were not presented for review by this Honorable Court, it seems appropriate to maintain the distinction between the rights of a Jones Act seaman against his employer, in contradistinction to the rights of a Jones Act seaman against a negligent third party. Such a result makes sense both from point of view of equity as well as from good public policy. What compelling reason is there to restrict recovery under the Jones Act against non-employers, in view of the fact that the Jones Act was intended to be expansive to, not restrictive of, a seaman's rights? Uniformity considerations would seem to militate

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[8] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

[9] The question of recovery by a longshoreman against an employer/vessel owner is not relevant in the context of the instant case.

to granting a seaman no lesser rights than are enjoyed by longshoremen or passengers.

b. Is "uniformity" necessary in the case at bar

Unless two and a half centuries of the development of the American jurisprudence in admiralty is to be revamped, there is clearly no current "uniformity" in the treatment of longshoremen, maritime workers, passengers, or girls on jet skis. Congress does mandate that there be universality in the damages available to a Jones Act seaman against his employer. In the case at bar, no specific statute applies regulating recovery against Pulmosan or Clemco.

There is nothing factually or philosophically presented in the holding of *Miles* which forecloses the analyses and the results arrived at in the district court cases cited *supra,* or by the Louisiana court in *Warren v. Sabine Towing & Transp. Co., Inc., supra.* A dichotomy exists among the lower courts. It lies solely in the hands of this Honorable Court to resolve the issue.

The article by Professor Robert Force in 55 Louisiana Law Review 745 presents a more scholarly analysis at much greater length than would be appropriate here. The subtitle of the article *"The Curse of Miles v. Apex Marine Corp.; the Mischief of Seeking 'Uniformity' and 'Legislative Intent' in Maritime Personal Injury Cases"* is instructive. It is of interest that Professor Force concludes that maritime tort law is not "**dominated** by statute." *Id.* at 771 (emphasis in original). While Congress has given some legislative guidance, "Congress has also preserved the judicially created rights of these employees to sue for vessel negligence and to bring tort actions against third parties. In the

context of tort litigation, the rights of maritime workers are primarily dependent on the rules of general maritime law." *Id.* It is significant that Congress, while intentionally overruling the *Sieracki* doctrine, did not legislatively overrule either *Moragne* or *Gaudet*.[10] *Yamaha Motor Corp. v. Calhoun, supra*, protects the survivors of girls on jet skis in territorial waters. The Constitution places the development of the admiralty law in the hands of the federal courts, subject only to direct legislative intervention. Applicant respectfully suggests that Congress has not directly foreclosed a seaman's rights against a non-employer. Thus the award of non-pecuniary damages against a non-employer violates no apparent Congressional intent, and would be consistent with general maritime jurisprudence.

It may be helpful to quote at length from Professor Force's article in order to illustrate the academic view of whether it is necessary to extend the uniformity required under the limited factual context of *Miles* to areas not actually pre-empted by statute:

> "A distinction should also be made between a suit brought by a seaman's beneficiaries against the decedent's employer and a suit against a non-employer defendant. The Jones Act creates a negligence action only against a seaman's employer. It does not create any rights against non-employers. Therefore, there is neither a statute nor a congressional policy restricting the award of damages in suits against non-employers.

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[10] *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); *Sea Land Services v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

There are rational reasons for allowing a seaman's beneficiary to recover loss of consortium against a non-employer and yet deny recovery against an employer. The first is based on the Court's premise in *Miles* that, under the Jones Act, Congress intended to restrict recovery in wrongful death actions to pecuniary loss. As stated above, the Jones Act creates a negligence action that is more advantageous to seamen on the liability issue than the general maritime law negligence action. It may be argued that the restriction on the scope of damages should be considered a sort of a 'trade-off.' In other words, Jones Act beneficiaries get the benefit of substantive rules which make it easier to establish liability, and employers get the benefit of the 'pecuniary' damages restriction. However, in actions against a non-employer, a person who happens to be a Jones Act seaman is relegated to the general maritime law, as is a non-seaman. Where the beneficiaries of a seaman cannot bring suit under the Jones Act and invoke the benefits of that statute because the defendant was not the decedent seaman's employer, it seems unfair to impose the Jones Act detriment by way of restrictions on damages. The Jones Act imposes liability on a specified class of defendants, employers of seamen. The court in *Miles* believed itself constrained by the Jones Act from imposing on this designated class of defendants more extensive liability under judge-made law than Congress had seen fit to authorize. This deference to the Jones Act employer is inapplicable in an action against a defendant who was not the seaman's employer. None of the major cases decided by the Supreme Court, *Sieracki*, *Moragne*, *Gaudet*, or *Alvez*, involved a suit against the decedent

> longshoreman's or injured longshoreman's employer. Suits against employers are virtually precluded under the LHWCA. Thus, the rules applicable to suits by seamen and maritime employees against their employers and suits by seamen and maritime employees against non-employers have always differed." 55 La.L.Rev. at 795.

The inequity of foreclosing a seaman's rights to non-pecuniary recovery against entities other than his employer might well be illustrated by a hypothetical. Assume that three persons, a passenger, a maritime worker and a Jones Act seaman, were all aboard the M/V JUSTICE. Assume that the vessel owner was the employer of the seaman. Next assume that an instrumentality owned by a third party non-employer collides with the M/V JUSTICE, causing the death of the passenger, the worker and the seaman. Further assume that there is absolutely no negligence or unseaworthiness on the M/V JUSTICE or its crew, owners or operators. The entire event takes place in territorial waters.

In that circumstance, the survivors of the passenger and the maritime worker would receive full compensation against the third party wrongdoer. However, under the expansion of *Miles* fostered by the lower courts, the seaman's family would receive no non-pecuniary damages. If, as with Ms. Miles, the survivor were not a dependent of the decedent, the seaman's survivor would recover virtually nothing. If he were lost at sea, there would not even be burial expenses. Considering the vastly different treatment of passenger and maritime worker, such a result is the antithesis of "uniformity," "solicitude" or equity.

Congress has not mandated such a result. Why should federal admiralty courts be compelled to restrict the rights of seamen, who have traditionally been viewed as wards of the court deserving of great solicitude, unless a clear mandate issues from Congress to do so?

CONCLUSION

Petitioners urge the court to limit the holdings of *Miles v. Apex Marine* to a seaman's recovery against his employer. Why should a negligent manufacturer, navigator, contractor or any other actor be given a free pass to kill or maim a Jones Act seaman and have his responsibility to the seaman or his family limited to only pecuniary damages? Nothing in the Jones Act suggests that Congress intended to make Jones Act seamen helpless targets to the generalized negligence of all tort feasors. If non-pecuniary damages are denied, there will be a glaring lack of uniformity between the recovery allowed to seamen and that allowed to other victims of maritime torts.

The decision of the Fifth Circuit Court of Appeals should be reversed, and the case should be remanded to the trial court to determine the appropriate measure of non-pecuniary damages due and owing from the non-employer manufacturers in the pending action for wrongful death.

Respectfully submitted,

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Barbara *Scarborough*, Individually and on behalf of decedent William A. *Scarborough*; Rhonda *Scarborough* Halterlein, individually and on behalf of decedent William A. *Scarborough*; William *Scarborough*, Jr., individually and on behalf of decedent William A. *Scarborough*, Plaintiffs-Appellants -vs- *CLEMCO* INDUSTRIES, also known as *Clemco*-Clemintina Ltd; ET AL Defendants *Clemco* Industries, Inc., a.k.a. *Clemco*-Clemintina Ltd.; Pulsoman Safety Equipment Company; Century Indemnity Company; as successor to CCI Insurance Company as successor to Insurance Company of North America; Defendants-Appellees

No. 03-30985

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

391 F.3d 660; 2004 U.S. App. LEXIS 24092

November 18, 2004, Filed

As Revised November 22, 2004.

COUNSEL: For Barbara Scarborough, Individually and on behalf of decedent William A. Scarborough; Rhonda Scarborough Halterlein, individually and on behalf of decedent William A. Scarborough; William Scarborough, Jr., individually and on behalf of decedent William A. Scarborough Plaintiffs-Appellants: A Remy Fransen, Jr, Fransen & Hardin, New Orleans, LA; Jodi Jacobs Aamodt, Jacobs, Manuel & Kain, New Orleans, LA.

For Clemco Industries, a.k.a. Clemco-Clemintina Ltd, Defendant-Appellee: Roger Douglas Marlow, Hulse & Wanek, Covington, LA.

For Century Indemnity Company; as successor to CCI Insurance Company as successor to Insurance Company of North America Defendant-Appellee: James M Garner, Martha Y Curtis, Jacob Albert Airey, Sher, Garner, Cahill, Richter, Klein, McAlister & Hilbert, New Orleans, LA.

For Pulsoman Safety Equipment Company, Defendant-Appellee: Darrell K Cherry, Deutsch, Kerrigan & Stiles, New Orleans, LA.

JUDGES: Before JONES and WIENER, Circuit Judges, and LITTLE*, District Judge.

OPINION BY: Little

OPINION: LITTLE, District Judge:

I. FACTUAL AND PROCEDURAL HISTORY

This appeal arises from the district court's judgment dismissing the claims for nonpecuniary damages of Appellants, Barbara Scarborough, Rhonda Scarborough, and William Scarborough, Jr. ("Appellants"). *See Scarborough v. Clemco Indus.,* 264 F. Supp. 2d 437 (E.D. La. 2003) (stating the reasons upon which the district court dismissed the claim for nonpecuniary damages). Appellants had sued, *inter alia,* Clemco Industries, Inc. ("Clemco"), Pulsoman Safety Equipment Co. ("Pulsoman") and Century Indemnity Co. ("Century") (collectively "Appellees"), individually and for damages they sustained as a result of William Scarborough's wrongful death.

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* District Judge of the Western District of Louisiana, sitting by designation.

Scarborough worked aboard sandblasting vessels between 1959 and 1967. These vessels maintained the protective coatings of offshore oil platforms through the use of abrasive sandblasting. The equipment used in this procedure included sand pots located within the hull of the vessel, compressors located on the deck of the vessel, hoses that were connected to the compressor and brought aboard the platforms, and hoods worn by the decedent while sandblasting. It is alleged that the hoods worn by Scarborough while sandblasting were manufactured by Pulsoman and Clemco. The hoods were allegedly defective and caused Scarborough to inhale silica and other materials. The inhalation of these materials caused Scarborough to develop silicosis.

In 1977, Scarborough brought suit in the United States District Court for the Eastern District of Louisiana against his employer, Appellees, and certain insurers alleging that their negligence had caused him to develop silicosis and that he was permanently disabled. *Scarborough v. N. Assurance Co., et al.,* No. 77-2523 (E.D. La. 1977) (Heebe, J.) ("*Scarborough I*"). The jury in that case returned a $650,000 verdict in Scarborough's favor. The jury's findings of fact included, *inter alia,* that Scarborough was a Jones Act seaman, a status he sought, and that the negligence of his employer and the manufacturers of vessel equipment caused his disability when they provided equipment that rendered the vessel unseaworthy.

Scarborough died of respiratory failure on 21 March 2002. Approximately ten months later, Appellants brought suit against a majority of the *Scarborough I* defendants for wrongful death, arguing that the defendants were precluded by the doctrine of collateral estoppel from rearguing the issue of their liability for causing Scarborough to

develop silicosis. *Scarborough v. Clemco Indus.*, 264 F. Supp. 2d 437 (E.D. La. 2003) ("*Scarborough II*"). The *Scarborough II* court, in an order addressing various cross motions for dismissal and summary judgment, made the following pertinent findings:

> 1. Appellants' cause of action against Clemco and Pulsoman for wrongful death arises under maritime law and is subject to federal admiralty jurisdiction.
>
> 2. Appellants are precluded by the doctrine of collateral estoppel from arguing that Scarborough was not a Jones Act seaman.
>
> 3. Under the uniformity principle announced in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29, 112 L. Ed. 2d 275, 111 S. Ct. 317 (1990), a Jones Act seaman and his survivors may not recover non-pecuniary damages in a wrongful death suit against a non-employer third party.

264 F. Supp. 2d at 447. The motions for dismissal and summary judgment were denied in the district court's Order and Reasons entered on 16 May 2003 because there were material issues of fact in connection with Appellants' pecuniary damages claims that were in dispute. *Id.* After the pecuniary damages claims were settled, however, the motion to dismiss was granted by the district court in its Final Judgment entered on 1 October 2003.

Appellants now appeal two legal conclusions, contained in the district court's Order and Reasons, based upon which it later dismissed Appellants' claims:

> 1) Appellants' claims against Clemco, Pulsoman, and Century are subject to federal admiralty jurisdiction.

2) A Jones Act seaman's survivors may not recover nonpecuniary damages against a non-employer third party in a maritime wrongful death action.

As explained below, we affirm the trial court.

II. DISCUSSION

A summary judgment granting a motion to dismiss and the legal conclusions upon which it is based are reviewed de novo. *Vais Arms, Inc. v. Vais,* 383 F.3d 287, 291 (5th Cir. 2004). "When de novo review is compelled, no form of appellate deference is acceptable." *Salve Regina College v. Russell,* 499 U.S. 225, 238, 113 L. Ed. 2d 190, 111 S. Ct. 1217 (1991).

A. Federal Admiralty Jurisdiction

Determinations of the applicability of federal admiralty jurisdiction are governed by the two part test adopted by the Supreme Court in *Sisson v. Ruby,* 497 U.S. 358, 363, 111 L. Ed. 2d 292, 110 S. Ct. 2892 (1990) ("*Sisson*").

After *Sisson*, then, a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must "assess the general features of the type of incident involved," to determine whether the incident has "a potentially disruptive impact

> on maritime commerce." Second, a court must determine whether "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity."

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534, 130 L. Ed. 2d 1024, 115 S. Ct. 1043 (1995) (citations omitted).

i. The Location Test

The location requirement for invocation of federal admiralty jurisdiction can be satisfied in two ways: 1) showing that the tort occurred on navigable water, or 2) showing that the injury was caused by a vessel in navigable water. *Id.* at 534-35. Appellants argue that Scarborough's injuries were not caused by a vessel on navigable water.

What actually caused the harm to Scarborough was the inhalation of silica and other particles. These deleterious materials were created when sand stored in a sand pot in the hull of the vessel on which Scarborough worked was forced, by means of an air compressor located on the deck of the vessel, through a hose and out onto whatever surface Scarborough was trying to maintain. The appurtenances of the vessel, therefore, were one of the 'but for' causes of the injury to Scarborough. For the vessel to be a cause of Scarborough's injuries under *Sisson*, however, the vessel must have been a proximate cause of his injuries. *Id.* at 537-38. In this case, it appears that the hoods and masks produced by Appellees proximately caused the injuries to Scarborough. Therefore, only if the hoods and masks are themselves found to be appurtenances of the

vessel can the location test be met under this prong. The court does not, however, need to address the question of whether the masks and hoods here at issue were appurtenances of the vessels upon which Scarborough worked.

Even if the hoods and masks are not appurtenances of the vessels on which Scarborough worked, the first means for meeting the location test is satisfied because the tort occurred on navigable water. Appellants argue that the facts of this case do not support a finding that the tort occurred on navigable water. They base this contention on the assertion that the sandblasting that ultimately injured Scarborough was done on fixed offshore platforms that are considered to be land under the Outer Continental Shelf Lands Act ("OCSLA"). 43 U.S.C. §§ 1331-1356a (2004). Appellants' argument, however, is undermined by Scarborough's own testimony during *Scarborough I*. When asked if he had to "get on the rig to sandblast," Scarborough stated that although sandblasting was usually done on the rig, "we occasionally blasted off the boat" when "working around the edge of the water line." Similarly, Scarborough testified that some of the offshore rigs upon which he worked were not fixed. Given that Scarborough's injury developed over a period of eight years, when he worked to some extent around the edge of the water line and on platforms not fixed to the ocean floor, Appellants' argument that the tort did not occur on navigable water is less than persuasive.[1]

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[1] It should be noted that although Appellants are correct in their contention that Judge Heebe found that the assertion of federal admiralty jurisdiction was not warranted in *Scarborough I*, that determination was not based on a finding that the location of the tort was not a maritime location. Instead, Judge Heebe based his determination on the

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ii. The Connection Test

The connection test for invocation of federal admiralty jurisdiction has two requirements. First, the activity at issue must be of a sort with potential to disrupt maritime commerce. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 130 L. Ed. 2d 1024, 115 S. Ct. 1043 (1995). Second, a court must determine whether the general character of the activity giving rise to the incident bears a substantial relationship to particularly maritime activity. *Id.* Before determining if the activity at issue is of a sort with potential to disrupt maritime commerce, courts should characterize the activity at issue at an "intermediate level of generality." *Id.*

Appellants argue that the proper characterization of the activity here at issue is "injury to a worker located on a statutory island." Such a characterization fails to take into account the district court's binding judgment that the *Scarborough I* jury's determination that Scarborough was a Jones Act seaman precludes Appellants from now arguing that he was a general maritime worker under OCSLA. Similarly, Appellants neglect to take into account the fact that a significant portion of the work performed by Scarborough was done on navigable water.

A more reasonable and fair description of the activity at issue at an intermediate level of generality would be "injury to a Jones Act seaman due to the negligence of a non-employer." Using such a description, it is clear that the sandblasting activity is of the sort with potential to

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fact that sandblasting is not a peculiarly maritime activity. As noted by the district court in *Scarborough II*, under *Sisson*, invocation of federal admiralty jurisdiction is determined now using a different test.

disrupt maritime activity. Therefore, the first requirement of the connection test is met.

The second requirement of the connection test is that the general character of the activity giving rise to the incident must show a substantial relationship to particularly maritime activity. *Id.* In *Grubart,* however, the Supreme Court held that "as long as one of the putative tortfeasors was engaged in traditional maritime activity, the allegedly wrongful activity will 'involve' such traditional maritime activity and will meet the second nexus prong." *Id.* at 541. Given that Scarborough's employers were found liable for negligence under the Jones Act, in that the employer failed to provide safe and protective gear, it is clear that one of the tortfeasors in this case was involved in traditional maritime activity.

Appellants argue, however, that the views expressed by Justice O'Connor in her concurrence in the *Grubart* decision suggest that this court should not follow the plain language of the majority's decision, but should instead interpret it as *permitting* federal courts to find that admiralty jurisdiction exists as to a non-maritime party when one of the tortfeasors is involved in maritime activity and the traditional tests for impleader and supplemental jurisdiction are met as to the non-maritime party.[2] Justice

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[2] O'Connor's concurrence reads in pertinent part:

> I concur in the Court's judgment and opinion. The Court properly holds that, when a court is faced with a case involving multiple tortfeasors, some of whom may not be maritime actors, if *one* of the putative tortfeasors was engaged in traditional maritime activity alleged to have proximately caused the incident, then the supposedly wrongful activity 'involves' traditional maritime activity. The possible involvement of other, nonmaritime parties does

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O'Connor's concurrence, which addresses only this issue, is just that – a concurrence and not a part of the majority opinion for a reason. The majority opinion in *Grubart* stated: "The substantial relationship test is satisfied when at least one alleged tortfeasor was engaging in activity substantially related to traditional maritime activity and such activity is claimed to have been a proximate cause of the incident." *Id.* at 541. Justice O'Connor's concurrence does not provide this court with a sufficient justification for ignoring the plain language of the *Grubart* majority. Therefore, the court finds that a substantial relationship to maritime activity exists in this case.

Because the *Sisson* test is satisfied, federal admiralty jurisdiction exists over the claims by Appellants.

B. Does the Miles uniformity principle prevent the recovery of nonpecuniary damages in a suit brought by a Jones Act seaman or his survivors against a non-employer third-party?

In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29, 112 L. Ed. 2d 275, 111 S. Ct. 317 (1990), the Supreme Court recognized a general maritime cause of action for the wrongful death of a seaman. The Court based this decision

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not affect the jurisdictional inquiry as to the maritime party. I do not, however, understand the Court's opinion to suggest that, having found admiralty jurisdiction over a particular claim against a particular party, a court *must* then exercise admiralty jurisdiction over *all* the claims and parties involved in the case. Rather, the court should engage in the usual supplemental jurisdiction and impleader inquiries.

Grubart, 513 U.S. at 548 (O'Connor, J., concurring).

on the reasoning of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970). The *Miles* court, however, found that *Moragne* did not entertain the issue of the scope of damages recoverable in a maritime wrongful death action. *Miles,* 498 U.S. at 29. In addressing this issue, the Court held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman."[3] *Id.* at 32. In so holding, the Court said that it was "restoring a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.*

The plain language of *Miles* encompasses the factual scenario before the court today. Scarborough, at his own request, was found to be a Jones Act seaman, Appellants have brought a wrongful death action, which lies under general maritime law. Appellants, however, try to distinguish this case from *Miles* by arguing that the principle of uniformity announced in that decision is not intended to reach the facts of this case.

The first argument with which Appellants attempt to distinguish this case from *Miles* is based on *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199, 133 L. Ed. 2d 578, 116 S. Ct. 619 (1996). In *Yamaha,* the Court found that state statutes that allow nonpecuniary damages are not displaced by federal admiralty law in state territorial waters. In doing so, the Court distinguished *Yamaha* from *Moragne,* saying that case "centered on the extension of relief, not the contraction of remedies." *Id.* at 214. The

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[3] We specially mention that the *Miles* case included a non-employer as a party defendant.

Court's holding in *Yamaha,* however, was limited to non-seafarers in territorial waters. This case deals with neither a non-seafarer nor territorial waters.

Appellants further argue that this case is analogous to *Yamaha* because Judge Heebe, in *Scarborough I,* applied state products liability law to the claims against Pulsoman and Clemco. The district court, however, correctly noted that since the time of Judge Heebe's ruling, products liability law has been incorporated into the general maritime law. *Scarborough v. Clemco Indus.,* 264 F. Supp. 2d 437, 445 (E.D. La. 2003) (citing *East River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 865, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986)). Today, Scarborough's claims against Pulsoman and Clemco would fall under general maritime law.

Scarborough was judicially determined to be a Jones Act seaman, injured outside of territorial waters. He sued on a cause of action that arises under general maritime law. There are few similarities between this case and *Yamaha.* Appellants' argument that *Yamaha* and not *Miles* should control, therefore, is rejected.

The second argument Appellant makes in an attempt to distinguish this case from *Miles* centers on the fact that the defendants are not Scarborough's employers, but are instead non-employer third parties. A seaman may bring suit under the Jones Act only against his employers. Appellants would have this court look beyond the plain language of *Miles* and interpret that case as applying only to suits brought against a seaman's employers because,

through the Jones Act, Congress has not addressed the issue of non-employer liability.[4]

District courts within this circuit are split on the issue whether the *Miles* uniformity principle limits the recovery of a seaman to pecuniary damages in all cases or only in cases in which suit is brought against the seaman's employer. *See, e.g., Stogner v. Cent. Boat Rentals, Inc.*, 326 F. Supp. 2d 754, 759 (E.D. La. 2004) (holding that *Miles* does not preclude the recovery of nonpecuniary damages in personal injury suits by Jones Act seaman against non-employer third parties); *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75, 76 (E.D. La. 1991) (holding that Jones Act seaman status has no relevance in allowing a seaman recovery under general maritime negligence law against a non-employer third party); *Trident Marine, Inc. v. M/V Atticos*, 876 F. Supp. 832, 837 (E.D. La. 1994) (holding that loss of society damages are not available to the survivors of a Jones Act seaman in suits against non-employer third parties). In this case, the district court held that "the *Miles* uniform rule precluding recovery for nonpecuniary damages includes situations in which a seaman's dependents sue a non-employer." *Scarborough v. Clemco Indus.*, 264 F. Supp. 2d 437, 442 (E.D. La. 2003).

In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1506 (5th Cir. 1995) (en banc), this court articulated the procedure for determining whether the *Miles* uniformity principle limits the available damages in a particular case.

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[4] It should be noted that *Miles* has been interpreted as preventing the recovery of nonpecuniary damages in personal injury suits brought by seamen, as well as wrongful death claims. *Murray v. Anthony Bertucci Constr. Co.*, 958 F.2d 127 (5th Cir. 1992).

> In order to decide whether (and how) *Miles* applies to a case, a court must first evaluate the factual setting of the case and determine what statutory remedial measures apply, if any, in that context. If the situation is covered by a statute like the Jones Act or DOHSA, and the statute informs and limits the available damages, the statute directs and delimits the recovery available under the general maritime law as well . . . . The general maritime law will not expand the available damages when Congress has spoken to the relief that it deems appropriate or inappropriate.

Id. The *Guevara* court found that the *Miles* decision was itself a perfect example of this approach. The *Miles* court found that the factual setting in that case was the wrongful death of a seaman, that the wrongful death of a seaman was covered by the Jones Act, and that even though suit was brought under general maritime law and not under the Jones Act, the court was still obliged to follow the Jones Act policy of limiting damages in such cases to pecuniary losses.

As mentioned above, Appellants argue that because this suit is one against a non-employer, the facts of this case do not fall within the class of scenarios with which the Jones Act is concerned, and, therefore, the *Miles* uniformity principle does not apply. *Miles* characterized the conduct with which it was concerned as the wrongful death of a seaman, however, and this language guides us in the case we now consider.

The real issue for our purposes, though, is whether the principles articulated in *Guevara* for the application of *Miles* require this court to characterize the conduct we now explore in a more specific manner than the Supreme

Court did in *Miles*. A fair reading of *Guevara* requires us to determine whether the facts fall under the remedial scheme of any statute that would prohibit this court from describing the facts of this case as simply the wrongful death of a Jones Act seaman. In this case, since non-employers are not subject to the remedial measures of the Jones Act, the *Guevara* principles cannot be met. It would be improper to try to avoid this result by describing the conduct involved in over-generalized terms.

Even though the *Guevara* court's principles for application of *Miles* may not be met in this case, *Guevara* still instructs that this court should find that nonpecuniary damages are not available. *Guevara*, 59 F.3d at 1513. In *Guevara*, this court found that no Congressional remedial scheme prohibited the award of nonpecuniary damages in general maritime suits for maintenance and cure. *Id.* The court still found, however, that nonpecuniary damages should not be allowed based on two factors. First, although no Congressional act was directly applicable, the court found that Congressional acts applied to highly analogous factual scenarios and that the judiciary should not allow more expansive remedies in a judicially created cause of action than Congress had allowed in related remedial schemes. *Id.* Second, the court found that a concern for uniformity in federal admiralty law, as strongly expressed in *Miles*, militated against allowing punitive damages in one class of maintenance and cure actions but not in another. *Id.* Similar concerns are applicable in this case.

The facts in this case are analogous to causes of action brought pursuant to the Jones Act. It would be improper for this court to allow the surviving spouse and heirs of a Jones Act seaman to recover nonpecuniary damages in this case when Congress has disallowed the recovery of

identical damages in a Jones Act suit. The genesis of Appellants' claims is maritime through and through. *Miles* plainly limits recovery to pecuniary damages. We will not retreat from the bright line directive of *Miles*. The *Miles* opinion is concerned with uniformity in the damages recoverable by a Jones Act seaman and his survivors, not with uniformity of the types of damages to which various defendants are subjected.[5]

For these reasons, the court finds that neither one who has invoked his Jones Act seaman status nor his survivors may recover nonpecuniary damages from non-employer third parties.

III. Conclusion

We AFFIRM the district court's judgment that federal admiralty jurisdiction is proper in this case and its holding that a Jones Act seaman or his survivors cannot recover nonpecuniary damages from a non-employer third party.

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[5] Our holding is in accord with the Ninth Circuit's resolution of the same issue. *Davis v. Bender Shipbuilding and Repair Co.*, 27 F.3d 426, 430 (9th Cir. 1994) (holding that "nothing in *Miles*' reasoning [suggests] that the decision turned upon the identity of the defendant. Indeed, not all of the defendants in *Miles* were Jones Act employers.").

BARBARA *SCARBOROUGH*, ET AL versus *CLEMCO* INDUSTRIES a/k/a *CLEMCO*-CLEMINTINA LTD, ET AL

CIVIL ACTION NO.03-0087 SECTION "C" (1)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

264 F. Supp. 2d 437; 2003 U.S. Dist. LEXIS 8346; 2003 AMC 1487

May 15, 2003, Decided
May 16, 2003, Filed, Entered

COUNSEL: For BARBARA SCARBOROUGH, RHONDA SCARBOROUGH HALTERLEIN, WILLIAM SCARBOROUGH, JR, plaintiffs: Stanley Joseph Jacobs, Jodi Jacobs Aamodt, Jacobs, Manuel & Kain, A. Remy Fransen, Fransen & Hardin, New Orleans, LA.

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For INTERSTATE INSURANCE COMPANY, defendant: James L. Pate, Ben Louis Mayeaux, Laborde & Neuner, Lafayette, LA.

For AMERICAN HOME ASSURANCE COMPANY, defendant: Michael Joseph Juneau, Karen B. Levy, The Juneau Firm, Lafayette, LA.

For CENTURY INDEMNITY COMPANY, defendant: James M. Garner, Martha Y. Curtis, Jacob A. Airey, Sher Garner Cahill Richter Klein McAlister & Hilbert, LLC, New Orleans, LA.

For PULMOSAN SAFETY EQUIPMENT COMPANY, defendant: Darrell K. Cherry, Deutsch, Kerrigan & Stiles, New Orleans, LA.

JUDGES: HELEN G. BERRIGAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: HELEN G. BERRIGAN

OPINION:

ORDER AND REASONS

Plaintiffs, Barbara Scarborough and her two adult children, Rhonda Scarborough Halterlein and William Scarborough, Jr. ("Plaintiffs") have filed this lawsuit individually and on behalf of the decedent, William Scarborough alleging causes of action under the Louisiana general tort law, survival and wrongful death actions pursuant to La.C.C. 2315.1 and 2315.2. Plaintiffs claim the decedent died as a result of the negligence of named defendants, Pulmosan Safety Equipment Company's ("Pulmosan") and Clemco Industries ("Clemco"). Also, named as defendants and sued under the Louisiana Direct

Action Statute, La.R.S. 22:655 are various insurance companies alleged to have issued policies of insurance covering the causes of action and damages alleged.[1]

On May 7, 2003, the Court heard Oral Argument on the following motions: (1) Century Indemnity Motion to Dismiss or Alternative Motion for Summary Judgment (Rec. Doc. 7);[2] (2) Pulmosan's Motion for Summary Judgment (Rec. Doc. 21); and Plaintiffs' Motion for Summary Judgment on Liability (Rec. Doc. 13). Because the factual and legal questions raised by all these motions are interrelated and interdependent, the Court treats them and the various oppositions and replies filed in response thereto as cross-motions for summary judgment *in globo*.

I. Background

William Scarborough died on March 21, 2002, allegedly due to respiratory failure as a result of silicosis. His spouse and adult children filed this state law wrongful

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[1] These insurance companies include: (1) Century Indemnity Company ("Century Indemnity"); (2) First State Insurance Company & New England Insurance Company, formerly known as New England Reinsurance Corporation, incorrectly named as New England Management Company (collectively "Hartford Insurers"); (3) Interstate Insurance Company ("Interstate"); and (4) Scottsdale Insurance Company ("Scottsdale").

[2] The memorandum in support of Century Indemnity's motion is adopted in its entirety and urged in the following Motions to Dismiss or Alternative Motions for Summary Judgment urged by: (1) Hartford Insurers (Rec. Doc. 14); (2) Clemco (Rec. Doc. 10); and (3) Interstate (Rec. Doc. 9). Scottsdale has filed a response memorandum in support of Century Indemnity's Motion, however, Scottsdale has not technically moved. (Rec. Doc. 25).

death, survival and general Louisiana tort law action.[3] An earlier lawsuit alleging that as a result of the negligence of various defendant corporations the decedent had contracted silicosis, thus rendering him totally and permanently disabled was filed on August 15, 1977, in Section B of this Court before Judge Heebe in an action captioned, *William Scarborough v. Northern Assurance Co. of America, et al,* 514 F. Supp. 337 (*Scarborough I*). Final Judgment was entered on June 18, 1981, in favor of the decedent in the amount of $650,000 as just compensation for his contracting silicosis. (*Scarborough I,* Rec. Doc. 550). The jury found all four defendants in *Scarborough I* to be proportionally at fault, however, Judge Heebe found each defendant liable *in solido* on the entire judgment.[4]

At issue in the various motions urged by the defense and by Plaintiffs is (1) whether Judge Heebe applied admiralty law or Louisiana state law in determining the liability of the defendants, Pulmosan and Clemco; (2) whether the judgment in *Scarborough I* has preclusive effect on the instant matter; and (3) whether the uniform principle of *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990) limits the remedies available to Plaintiffs in this action.

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[3] For purposes of convenience the Court refers to all three causes of action as wrongful death.

[4] The four defendants and their respective proportions of fault were: (1) Coating Specialist Inc. ("Coating Specialist") (36%); (2) Land and Marine Applicators ("L&M") (24%); (3) Pulmosan (17%); and (4) Clemco (23%). Coating Specialist and Land & Marine are/were vessel owners/operators and Pulmosan and Clemco were designers, manufacturers and distributors of certain safety equipment for use in sandblasting. (*Scarborough I,* Rec. Doc. 550).

II. Standard of Review

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, a district court must accept the factual allegations of the complaint as true and resolve all ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff. *See Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir. 1993). Unless it appears "beyond a doubt that the plaintiff can prove no set of facts in support of his claim," the complaint should not be dismissed for failure to state a claim. *Id.* at 284-285 (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)). However, conclusory allegations or legal conclusions masquerading as factual conclusions will not defeat a motion to dismiss. *See Blackburn v. City of Marshall,* 42 F.3d 925, 931 (5th Cir. 1995) (citing *Fernandez-Montes,* 987 F.2d at 284).

Further, Federal Rule 12(b) states that when on a motion "to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed.R.Civ.P. 12(b). Because the parties have introduced and/or made available to the Court the entire record in *Scarborough I* in support of these motions, the Court considers the motions under Rule 56.

The Court can grant a motion for summary judgment only when the "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 56(c)). Upon such a showing, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. *Id.* A factual dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Beck v. Somerset Technologies, Inc.*, 882 F.2d 993, 996 (5th Cir. 1989) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). When considering a motion for summary judgment, the Court "will review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mutual Automobile Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

III. Analysis

A. Whether Judge Heebe applied federal admiralty law or Louisiana State law to Pulmosan and Clemco in *Scarborough I*

Although disputed by all Defendants to this action, there is no question that Judge Heebe applied Louisiana state law to both Pulmosan and Clemco in *Scarborough I*. By Minute Entry dated June 18, 1981, issued on the same date as the Final Judgment, Judge Heebe states that the Jones Act employers, Coating Specialist and L&M were held responsible for "their negligence and the unseaworthiness of their respective vessels," whereas Pulmosan and Clemco "were responsible to plaintiff because of their negligence and the defective design, manufacture and distribution of their products." (Rec. Doc. 7, Ex. A, Final Judgment at 2). Judge Heebe clearly delineated the jurisdictional circumstances under which the judgment

was rendered and found that Pulmosan and Clemco were "sued by plaintiff in diversity and were found liable under Louisiana general tort law, i.e., negligence and products liability." (*Id.*, Ex. A, June 18, 1981 Minute Entry at 2). Additionally, the Final Judgment awards legal interest from the date of judgment on 60% of the verdict (the part apportioned to Coating Specialist and L&M) pursuant to maritime law, and awards legal interest from the date of demand on the remaining 40% (the part apportioned to Pulmosan and Clemco) pursuant to Louisiana state law. (*Id.* at 3). Finally, Judge Heebe's instruction to the jury clearly distinguishes the claims against Pulmosan and Clemco as arising under Louisiana state law. (*See* Jury Instructions, Trans. at 2077-80, 2089-90).

Defendants' reliance on Judge Heebe's December 22, 1981 Order in response to certain post-trial motions to amend the Court's determination of joint and several liability is without merit. In the December Order, Judge Heebe found "this is a close case, but one which we are willing to concede in favor of defendants *for the purposes of deciding the issue before us* because given the result which we reach, we do not think that the decision would be different if we apply admiralty law rather than Louisiana law." (Rec. Doc. 7, Ex. A, December Order at 6) (emphasis added). The post-trial "issue" before the Court was "whether the adoption of comparative fault as the measure of liability among multiple wrongdoers is not inconsistent with the notion of solidary, joint and several, liability to the plaintiff." (*Id.* at 7). The December Order does not reverse or revoke the decision of the Final Judgment or the explanatory Minute Entry issued on the same date. Rather, in the December Order, Judge Heebe concludes that he correctly assessed the jurisdictional circumstances

and correctly applied Louisiana law, however, the Court simply conceded that even if the proponents in the post-trial motions were correct regarding choice of law, the result regarding solidary, joint and several liability would be the same.

Because the Court finds that Judge Heebe applied Louisiana state law to both Pulmosan and Clemco in *Scarborough I,* Century Indemnity's Motion to Dismiss or Alternative Motion for Summary Judgment, joined and adopted by Hartford Insurers, Clemco and Interstate and Pulmosan's Motion for Summary Judgment are properly denied.[5]

[5] These defense motions all argue that because Judge Heebe applied admiralty law to Pulmosan and Clemco in *Scarborough I,* Plaintiffs are herein collaterally estopped from relitigating that issue again. Defendants submit that as a result of the application of admiralty law in *Scarborough I,* Plaintiffs' instant claims arising out of the death of William Scarborough are governed by the pecuniary damage limits imposed by the Jones Act. *See generally e.g. Miles.* Because all pecuniary damages available to Plaintiffs for the wrongful death of the decedent, with the exception of burial costs, have already been assessed and paid by the satisfied judgment in *Scarborough I,* Defendants argued that Plaintiffs' claims should be dismissed with the exception of burial expenses.

B. Whether Collateral Estoppel Precludes Relitigating the Element of Fault[6]

Pulmosan contends that if the Court finds that Louisiana law was applied in *Scarborough I* that Plaintiffs cannot claim offensive collateral estoppel as to liability based on the 1981 judgment, because the Louisiana Supreme Court has held that at the relevant time period at issue collateral estoppel did not exist under Louisiana state law. *Welch v. Crown Zellerbach Corp.*, 359 So.2d 154, 156 (La.1979) ("Collateral estoppel is a doctrine of issue preclusion alien to Louisiana law."); *Williams v. Divittoria*, 760 F. Supp. 564, 566-67 (E.D.La. 1991); *Bruce v. Becnel*, 747 So.2d 647, 649 (La.App. 5th Cir. 1999). Further, the creation of collateral estoppel by the State Legislature in 1991 expressly limited the scope of the new law to prospectively application only. *See* La.R.S. § 13:4231

Pulmosan submits that because issue preclusion in diversity is substantive, it is governed by state law. *Breeland v. Security Ins. Co.*, 421 F.2d 918 (5th Cir. 1969); *St Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 436 (5th Cir. 2000); *Williams*, 760 F. Supp. at 566. The Court

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[6] The parties do not dispute that collateral estoppel applies when the following three elements are met: "(1) the issue at stake must be identical to the one involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action." *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir. 1999). Nor do the parties dispute that offensive collateral estoppel requires a fourth equitable element that there exists "no special circumstance that would render preclusion inappropriate or unfair." *Copeland v. Merrill Lynch & Co. Inc.*, 47 F.3d 1415 (5th Cir. 1995); *see also RecoverEdge*, 44 F.3d at 1290-91 n.12. Finally, the parties do not dispute that the elements of collateral estoppel have been satisfied.

disagrees. Although a federal district court should apply state collateral estoppel principles when determining whether to give preclusive effect to an earlier state court judgment, "[w]hen a federal court sitting in diversity is considering the collateral estoppel affect of a prior *federal* judgment, this Circuit applies federal common law." *Wehling v. Columbia Broadcasting System,* 721 F.2d 506, 508 (5th Cir. 1983) (quoting *Reimer v. Smith,* 663 F.2d 1316, 1325 n.9 (5th Cir. 1981)) (emphasis in original).

In *Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir. 1975), the Fifth Circuit approved application of federal common law in diversity cases considering the res judicata affect of a prior federal judgment. In so doing, the Fifth Circuit expressly distinguished *Breeland* as involving the collateral effect of a prior criminal conviction. *Aerojet-General,* 511 F.2d at 715. Since that ruling, "[t]he underlying rationale of the *Aerojet-General* decision has been extended to cases involving collateral estoppel as distinguished from res judicata, and to preclude re-litigation of issues decided by a prior federal diversity judgment, in a subsequent federal case also based on diversity jurisdiction." *Vela v. Alvarez,* 507 F. Supp. 887 (S.D.Tex.1981) *citing e.g., Mooney v. Fibreboard Corp.,* 485 F. Supp. 242 (E.D.Tex.1980); *Flatt v. Johns Manville Sales Corp.,* 488 F. Supp. 836 (E.D.Tex.1980); *Willis v. Fournier,* 418 F. Supp. 265 (M.D.Ga.), *aff'd mem.,* 537 F.2d 1142 (5th Cir. 1976). In adopting the *Aerojet-General* rationale, the district court in *Vela* acknowledged that *Breeland* was limited to prior criminal convictions. *Vela,* 507 F. Supp. at 890 n.3. Accordingly, the Court joins other district courts in this circuit and narrowly construes *Breeland* to apply only to prior criminal convictions. Thus, under *Wehling,* federal common law controls in the case at bar and the

Court grants preclusive effect to the prior *federal* judgment.

C. Whether the Jury Finding in *Scarborough I* that the Decedent was a Seaman Invokes the *Miles* Uniform Principle in this Action

There is no question that in *Scarborough I* the jury expressly found that the decedent, William Scarborough was in fact a seaman while employed by Coating Specialist and L&M. (Rec. Doc. 21, Ex. B, Jury Interrogatories, Nos. 2 & 7). Pulmosan argues that Plaintiffs cannot assert that the parties are bound by the findings made in *Scarborough I* for collateral estoppel purposes and then pick and chose through the record to argue that the decedent was not a seaman. Pulmosan contends that the jury's prior finding that the decedent was in fact a seaman controls.

In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1505 (5th Cir. 1996), the Fifth Circuit interpreted *Miles* to have established a uniform rule for remedies available to seaman. "The wrongful death of a seaman is covered by the Jones Act." *Guevara,* 59 F.3d at 1506. It is well settled that recovery for non-pecuniary loss is not available to seamen or their survivors "under DOHSA, the Jones Act, or general maritime law." *Id.* at 1505. Additionally, the *Miles* uniform rule precluding recovery for non-pecuniary damages includes situations where a seaman's dependants sue a non-employer. *Thompson v. Cross Offshore Corp.*, Civ.A.No. 01-1914, 2001 WL 1297789, 2001 U.S. Dist. LEXIS 18045 (E.D.La., Oct. 25, 2001).

Plaintiffs now argue the decedent was not a seaman with respect to the manufacturers/distributors of the sandblasting equipment, Pulmosan and Clemco. Further,

Plaintiffs suggest that because their claims do not arise under the general maritime law, but instead arise under Louisiana state law that *Miles* and its progeny do not apply. In support, Plaintiffs rely on *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199, 116 S. Ct. 619 133 L. Ed. 2d 578 (1996) (holding that general maritime law does not pre-empt state law wrongful death remedies in an action based on the death of a nonseafarer in territorial waters); *and Warren v. Sabine Towing & Transportation Co.,* 831 So.2d 517 (La.App. 3d Cir. 2002) (finding Jones Act widow not precluded from obtaining non-pecuniary damages in wrongful death claim against third party manufacturers).

Specifically, Plaintiffs contend that there is no maritime nexus to the equipment manufactured and supplied by Pulmosan and Clemco because in deciding to apply state substantive law, Judge Heebe considered the "locality-plus" test articulated in *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972) and concluded that "there has been no evidence to suggest that sandblasting is a peculiarly maritime activity." (Rec. Doc. 7, Ex. A, December Order at 6). Thus, Plaintiffs submit that like Mr. Warren, the decedent was not a seaman with respect to Pulmosan and Clemco. The Court in *Warren* found:

> While Mr. Warren was a seaman covered by the Jones Act vis-a-vis his employer, he was not a seaman covered by the Jones Act vis-a-vis the manufacturer-defendants in this case. The fortuity of the third-party manufacturers' breach of duty occurring in the context of Mr. Warren's seaman employment duties rather than in the context of pleasure-seeking activities should not inure to the benefit of the third-party manufacturers so as to provide them a "safe harbor" to

> avoid nonpecuniary damages. Thus, under the facts of this case, we find Yamaha allows application of state-law wrongful death remedies, including nonpecuniary damages.

Warren, 831 So.2d at 537. First, as a threshold issue, the state court decision in Warren is not binding precedent on the Court. Second, although the Court appreciates the rationale behind the Louisiana appellate court decision in *Warren*, we also recognize certain inconsistencies in that decision coupled with a fundamental misapplication of *Miles*. Although it could be argued that the material facts of *Warren* can be cabined into the specific holding of *Yamaha*, the law according to *Miles* precludes the remedies afforded by the state court.[7]

Additionally, Plaintiffs' reliance on *Yamaha* for the proposition that non-pecuniary damages are available because of the prior finding of liability based on state law is misplaced. In *Yamaha*, a young girl, Natalie Calhoun was killed in a recreational jet ski accident, and subsequently her parents brought a wrongful death and survival action against the manufacturer of the jet ski for defective design and manufacture. The Supreme Court held that state court remedies were not displaced by the federal cause of action specifically because Calhoun was

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[7] *Warren* is contrary to *Miles*, because Mrs. Warren's wrongful death action was brought pursuant to the Jones Act and the general maritime law. *Miles* expressly holds that state law cannot supplement a federal maritime cause of action. The *Warren* court conflates general maritime jurisdiction with the application of maritime law. Critical to *Yamaha's* narrow holding is the fact that the Calhoun's cause of action arose under state law. In contrast, Mrs. Warren's cause of action arose under the Jones Act, which the Louisiana appellate court erroneously supplemented with state remedies.

not a seaman and therefore she was not the kind of plaintiff contemplated by the uniform tort recovery scheme uniformly applied pursuant to *Miles*. Also, the Supreme Court limited its holding to accidents occurring within state territorial waters.

Yamaha does not overrule *Miles*, and in fact it expressly acknowledges that the *Miles* uniform recovery scheme under the Jones Act must be enforced. *See Yamaha*, 516 U.S. at 215 citing *Miles*, 498 U.S. at 30-36. The *Miles* uniform rule is applicable to "all actions for the wrongful death of a seamen whether under DOSHA, the Jones Act, or the general maritime law." *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 202 (1st Cir. 1994). In the case at bar, because the decedent was adjudicated a seaman, *Yamaha* is inapplicable. *See Williams v. Chemoil Corp.*, 2002 U.S. Dist. LEXIS 7958, Civ.A.No. 01-2838, 2002 WL 662958 at *3 n.2 (E.D.La., Apr. 22, 2002) (*Vance, J.*).

The original Complaint in *Scarborough I* is entitled "Seaman's Complaint." (*Id.*, Ex. A at 1). In this "Seaman's Complaint," the decedent referred to himself "as a seaman and as a sandblaster/painter and/or foreman and member of the crew of vessels." (*Id.* at ¶¶ III & IV). The decedent invoked the Court's jurisdiction over Pulmosan and Clemco pursuant to "the General Maritime Law and 28 U.S.C. 1332." (*Id.* ¶ XII). Also, the decedent averred that "his injuries and illnesses occurred while plaintiff was a seaman." (*Id.* at ¶ XVI).

At trial in *Scarborough I*, the decedent vigorously advocated his seaman status, which his employers, Coating Specialist and L&M vigorously opposed. At the close of trial, counsel for the decedent reurged his motion for a directed verdict on the issue of seaman status stating:

> I think there is no question but that this gentleman enjoys the status as a seaman, as I pointed out earlier. He at all times, in doing his work, is attached and must, by necessity be attached to the vessel by a hose which permits the doing of his work, which is the sole and only purpose of the vessel, and that is sandblasting. And that in truth and fact, if he had been provided with the very equipment that makes the vessel unseaworthy, that is, the air-fed hose that he would be attached to the vessel by an air-fed hose that protects him from silicosis, and likewise attached to the vessel with a sand hose which allows him to perform the very purpose for which the vessel is in the sea, and that is, sandblasting.

(Trial Transcript, vol. VI, pp. 2016-17). The Final Pre-Trial Order confirms that the factual basis for all claims made against all defendants in *Scarborough I,* including the factual basis for the claims of unseaworthiness against the vessel owners was the "inadequate and deficient tools, supplies, appliances, and equipment, and manned by improperly trained, deficient, and inadequate officers and crew," specifically that equipment manufactured and supplied by Pulmosan and Clemco. (*Scarborough I* Rec. Doc. 457, Final Pre-Trial Order at 11-12).

In *Yamaha,* the Supreme Court recognized that "[s]ection 7 of DOSHA states: 'The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. This statement, by its terms, simply stops DOSHA from displacing state law in territorial waters.'" *Id.* at 215-16. Federalism concerns inherent in *Yamaha* suggest that Louisiana's interest in protecting it citizens from dangerous and defective products and product design with no specific

maritime nexus are not displaced by federal statutory laws designed to create a uniform scheme for recovery under federal maritime law. "When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided." *Yamaha,* 516 U.S. at 215 *citing Miles,* 498 U.S. at 30-36. Thus, for actions sounding in substantive maritime law the available damages are well established to preclude non-pecuniary damages. However, the crux of *Yamaha's* holding is that although federal statutory rights and remedies may not be supplemented by state rights and remedies under the jurisprudence of *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970) and *Miles,* federal law does not displace those state rights and remedies unaffected or not prescribed by Congress.

The jurisprudence of federal admiralty jurisdiction and choice of law experienced a significant evolution during the period from the late 1970's until the early 1990's. In 1981, when Judge Heebe applied state substantive products liability law to both Pulmosan and Clemco the significant caselaw controlling contemporary jurisprudence defining jurisdiction, choice of law and available remedies were formative and not as determined as they stand today. Notwithstanding the decision in *Miles,* this modern transformation has impacted the limits of federal maritime jurisdiction and federal recognition of state substantive products liability law. Consequently, if *Scarborough I* were decided today, there is no question that federal admiralty jurisdiction would be properly exercised over Pulmosan and Clemco and federal general maritime law would apply.

In 1981, Judge Heebe applied the locality-plus test of *Executive Jet* (1972) and found that admiralty jurisdiction did not apply to Pulmosan and Clemco because sandblasting was not unique to maritime endeavors. (*See* Rec. Doc. 7, Ex. A, December Order at 6). Yet, under the more broadly defined test recognized in *Sisson v. Ruby,* 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1991) and in effect today, there is no question that admiralty jurisdiction would attach to these two defendants. In *Sisson,* a standard commercial washer/dryer caught fire on a pleasure yacht causing damage to vessels in a small marina. The Supreme Court found that admiralty jurisdiction existed because the fire *could* have affected maritime commerce. *See Sisson,* 497 U.S. at 361, 110 S. Ct. 2892, *quoting Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 675 n.5, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982) ("when a 'potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity . . . admiralty jurisdiction is appropriate'"). Here, under the more liberal test in *Sisson,* injury to seamen by the development of silicosis is a potential hazard to maritime commerce and the sandblasting of offshore structures by vessel crews does bear a substantial relationship to traditional maritime activity.

Likewise, in 1981 Judge Heebe applied state products liability law to Pulmosan and Clemco, however, subsequent to *Scarborough I,* state substantive products liability law has been incorporated into the federal general maritime law. In *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.,* 565 F.2d 1129, 1135 (9th Cir. 1977) the Ninth Circuit incorporated strict products liability concepts into federal maritime law. This incorporation was not expressly recognized by the Supreme Court until five

years after *Scarborough I. See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865, 106 S. Ct. 2295, 2299, 90 L. Ed. 2d 865 (1986) ("We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law."). Therefore, today under a similar factual situation as in *Scarborough I,* a district court would apply general maritime law incorporating the principles of state substantive products liability law to defendants such as Pulmosan and Clemco. Additionally, after adoption of the *East River* standard, Judge Heebe's specific application of state substantive law to Pulmosan and Clemco bears no distinction because this law has been expressly incorporated into the federal general maritime law.

Accordingly, the jury finding in *Scarborough I* that the decedent was a seaman for statutory purposes invokes the *Miles* uniform principle in this case because he vigorously sought seaman status in the previous lawsuit and reaped the statutory benefits that flowed from that station. This is evident by the jury finding that his employers were 60% at fault. Had the decedent elected not to be considered a seaman, he presumably would not have been able to sue his employers and instead would have had to rely on workers' compensation.

Plaintiffs argue that the manufacturers of a defective product should not receive safe harbor and avoid payment of non-pecuniary damages simply because the injury happened to occur to a worker engaged in a maritime activity as opposed to one similarly engaged on land. Although the Court finds this rationale compelling in the abstract, it cannot overcome the fact that in this case, the seed of all of the decedent's causes of action, against all defendants in *Scarborough I,* including his claims of vessel

unseaworthiness emanated from the same nucleus of operative facts, specifically the inadequate equipment designed, manufactured and supplied by Pulmosan and Clemco. In fact, there was no other factual basis for any cause of action in the previous lawsuit.

Plaintiffs cannot distance themselves now from the finding that decedent was a seaman in order to recover precisely that which Congress felt was properly forfeited in exchange for the privilege that seaman's status wrought. *See generally, Yamaha* (discussing rationale behind *Moragne* in aligning new standard of strict liability for unseaworthiness claims with negligence-based state wrongful death actions). Plaintiffs' argument sounds in equity, however, the Court presumes they would be equally unwilling to disgorge the $390,000 portion of the satisfied judgment, which was attributable to the decedent's employers.[8] Finally, the Court also finds that Judge Heebe's application of state substantive products liability law is not outside the scope of federal general maritime today, nor was it necessarily so at the time of his decision.

D. Damages Available

At Oral Argument, counsel for Plaintiffs admitted that in recognition of intervening Louisiana law precluding joint and several liability for defendants assigned percentages of fault, Plaintiffs now seek only 40% of the current damages, specifically those which are attributable to the

[8] Incidentally, for a variety of reasons not germane to this proceeding, Pulmosan and Clemco paid a significant portion of the employer's share. However, that fact has no bearing on the Court's decision.

fault of Pulmosan and Clemco.[9] Further, counsel for Plaintiffs admitted that absent their claim for non-pecuniary damages, all possible pecuniary damages, with the exception of burial costs, were previously merged into the satisfied 1981 judgment.[10]

The Court agrees. *See Williams,* 2002 U.S. Dist. LEXIS 7958, [WL] *citing, Cruz v. Hendy Int'l Co.,* 638 F.2d 719, 722 n.1 (5th Cir. 1981) *rev'd on other grounds by Michel v. Total Transportation, Inc.,* 957 F.2d 186, 191 (5th Cir. 1992). In *Williams,* Judge Vance determined that a spouse's claim for loss of support was improper because her husband was entitled to recover the loss of future wages, which are available for her support. Likewise, Judge Vance found the wife's loss of services claim improper "because the services that would have been provided to the marital partnership are likewise embraced by the injured spouse's claim." *Id.* at *3.

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[9] In *Scarborough I,* the jury found Pulmosan and Clemco to be collectively at fault for 40% of the decedent's injury. *See* n.4, *supra.* By 1987 La. Acts No. 373, § 1, effective September 1, 1987, the Louisiana legislature amended La.C.C. Art. 2324 to eliminate solidary liability for certain joint tortfeasors. Amended subsection 2324(B) states that except for situations involving conspiracy to commit an intentional or willful act, "[a] joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable." La.C.C. Art. 2324(B).

[10] Plaintiffs concede that their survival action is properly dismissed.

E. Causation & Issues Particular to Insurers

In the interest of completeness the Court addresses two final issues. At Oral Argument, Plaintiffs conceded and the Court agrees that genuine issues of material fact remain in dispute concerning the decedent's cause of death that preclude summary judgment on liability. Causation, an essential element in the determination of liability is not ripe and some discovery is in order.

Additionally, Plaintiffs conceded and the Court agrees that they are not entitled to summary judgment against any of the defendant insurance companies because Plaintiffs have failed to provide the requisite evidence for summary judgment purposes particular to the defendant insurers. Under Louisiana law, "the burden in an action on an insurance contract is on plaintiff to establish every fact in issue which is essential to his cause of action or right of recovery, including existence of policy sued on, its terms and provisions, and that his claim is within its coverage." *B. T. U. Insulators, Inc. v. Maryland Casualty Co.*, 175 So.2d 899 (La.App. 2d Cir. 1965), *citing, Boyd v. White,* 123 So.2d 835 (La.App. 2d Cir. 1960); *see also Barber v. Best,* 394 So.2d 779 (La.App. 5th Cir. 1981).

IV. Conclusion

There is no question that Judge Heebe applied Louisiana state substantive law against Pulmosan and Clemco in *Scarborough I.* Because this determination issued from a prior federal judgment, it has preclusive effect on the instant matter. Further, the Court finds that the particular state substantive law, which Judge Heebe applied as against Pulmosan and Clemco is incorporated into the federal general maritime law. Additionally, the Court

determines that the jury finding in *Scarborough I* that the decedent was a seaman for statutory purposes is controlling in the instant matter for reasons stated above. Therefore, under the uniform rule expressed in *Miles,* Plaintiffs cannot supplement their claim of wrongful death with state law remedies. Non-pecuniary damages are not available.

Additionally, the Court finds that with the exception of burial costs, all available pecuniary damages have been fulfilled previously by the satisfied judgment in *Scarborough I.* Because Plaintiff has conceded that Pulmosan and Clemco are only responsible for 40% of the existing pecuniary damages, the Court finds that this 40% appropriation represents their total remaining potential liability.

Accordingly, **IT IS ORDERED** that the Motions to Dismiss or Alternative Motion for Summary Judgment submitted by:

(1) Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America, incorrectly named as ACE USA (Rec. Doc. 7);

(2) First State Insurance Company & New England Insurance Company, formerly known as New England Reinsurance Corporation, incorrectly named as New England Management Company (Rec. Doc. 14);

(3) Clemco Industries (Rec. Doc. 10); and

(4) Interstate Insurance Company (Rec. Doc. 9) are hereby **DENIED**.

IT IS FURTHER ORDERED that the Motion for Summary Judgment submitted by Pulmosan Safety Equipment Company (Rec. Doc. 21) is hereby **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment on Liability (Rec. Doc. 3) is hereby **DENIED**.

New Orleans, Louisiana, this 15th of May, 2003.

HELEN G. BERRIGAN

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM A. SCARBOROUGH	*	
	*	CIVIL ACTION
-versus-	*	
	*	NO. 77-2523
NORTHERN ASSURANCE CO. OF AMERICA, ET AL	*	SECTION: "B"
**********	*	

FINAL JUDGMENT

(June 18, 1981)

This matter came on for Trial by Jury on the Merits on January 5, 1981, and was submitted to the Jury for consideration by the Court, with Written Interrogatories, on January 28, 1981.

The Court at the conclusion of plaintiff's case granted Motions for Directed Verdicts urged by defendants, the Exxon Corporation, Chevron U. S. A., Inc., Shell Oil Company, Penrod Drilling Co., OKC Dredging, Inc., Mayronne Drilling Mud and Chemical Company, Mississippi Valley Silica Company, Inc., and Lone Star Industries, Inc.

On January 28, 1981, the matter was submitted to the Jury for consideration with Written Interrogatories.

On January 29, 1981, the Jury, after due deliberation, reached a unanimous verdict and returned the Written Interrogatories to the Court duly executed by its foreman, William A. Parnell.

The Jury concluded that the Northern Assurance Company policy had the standard jacket of said company when it was issued to said insured. The jacket, introduced

into evidence, encompasses a 36-month exclusion which, on the basis of the finding of fact of the Jury would make said policy inapplicable to the claims asserted by the plaintiff herein.

The Jury further concluded that plaintiff's former employers, Coating Specialists, Inc. and Land and Marine Applicators, Inc., were responsible to plaintiff because of their negligence and the unseaworthiness of their respective vessels on which plaintiff worked as a seaman, and further concluded that defendants, Pulmosan Safety Equipment Corporation and Clemco, Inc., were responsible to plaintiff because of their negligence and the defective design, manufacture, and distribution of their products.

The Jury, at the Court's request, apportioned the percentage of culpability of the defendants as follows:

Coating Specialists, Inc.	36%
Land and Marine Applicators, Inc.	24%
Pulmosan Safety Equipment Corporation	17%
Clemco, Inc.	23%

Finally, the Jury determined that the sum of SIX HUNDRED FIFTY THOUSAND ($650,000) DOLLARS would fairly and adequately compensate the plaintiff for the damages resulting from his contraction of Silicosis and that TEN THOUSAND ($10,000) DOLLARS each, from Coasting Specialists, Inc. and Land and Marine Applicators, Inc., would fairly compensate plaintiff for maintenance and cure.

The Court, upon receipt of the Jury verdict by Written Interrogatories, advised the Jury, the parties, and all counsel present, that the awards for maintenance and cure were inconsistent with the Court's instruction to the Jury that an award could not be made for those items if the

Jury made an award to plaintiff for past lost wages. Accordingly, the Court directed a verdict striking the awards for maintenance and cure.

Prior to commencement of the Trial, Underwriters at Lloyds and Harbor Insurance Company, alleged insurors of Coating Specialists, Inc. and Land and Marine Applicators, Inc., filed a Motion for Summary Judgment which was deferred by the Court for determination after the conclusion of the Trial, the Court having reserved a determination of the insurance issues, with the exception of Northern Assurance Company, to itself.

On May 7, 1981, the Court granted the Motions for Summary Judgment filed by said insurors.

The Court in accordance with F.R.Civ.P. 54(b), recognizing that this suit encompasses multiple claims for relief and multiple parties and having determined that there is no just reason for delay, directs the entry of a Final Judgment in the above-entitled and numbered cause regarding the claims of the parties hereinafter referenced, as follows, to wit:

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of plaintiff, William A. Scarborough, and against defendants, Coating Specialists, Inc., Land and Marine Applicators, Inc., Pulmosan Safety Equipment Corporation and Clemco, Inc., jointly and *in solido,* in the full sum of SIX HUNDRED FIFTY THOUSAND ($650,000) DOLLARS, together with legal interest thereon from date of this Judgment as to 60% of it and from date of judicial demand as to 40% of it and all costs of these proceedings;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Judgment for purposes of contribution and indemnity, as either may be applicable to the defendants cast in Judgment, be apportioned among the defendants as follows:

Coating Specialists, Inc.	36%
Land and Marine Applicators, Inc.	24%
Pulmosan Safety Equipment Corporation	17%
Clemco, Inc.	23%

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of Northern Assurance Company dismissing plaintiff's suit;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of Underwriters at Lloyd's and Harbor Insurance Company dismissing plaintiff's suit;

IT IS FURTHER ORDERED ADJUDGED AND DECREED that there be Judgment herein in favor of the Exxon Corporation, Shell Oil Company, Chevron U. S. A., Inc., Penrod Drilling Company, Inc., Mississippi Mud and Chemical Company, and OKC Dredging, Inc., dismissing plaintiff's suit;-

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Jury's award of maintenance and cure in favor of plaintiff and against coating Specialists, Inc. and Land and Marine Applicators, Inc. in the amount of TEN THOUSAND ($10,000) DOLLARS, each, be and the same is hereby set aside.

NEW ORLEANS, LOUISIANA, this 18th day of June, 1981.

/s/ Frederick J. R. Heebe
FREDERICK J. R. HEEBE
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Minute Entry
June 18, 1981
Heebe, J.

WILLIAM A. SCARBOROUGH	CIVIL ACTION
versus	NO. 77-2523
NORTHERN ASSURANCE CO. of AMERICA, et al.	SECTION B

(Filed Jun. 18, 1981)

As of the same date as this minute entry, the Court has signed a Judgment in this case granting to plaintiff William A. Scarborough an award of $650,000, jointly and severally (*in solido*) against defendants Coating Specialists, Inc., Land and Marine Applicators, Inc., Pulmosan Safety Equipment Corporation and Clemco, Inc., this amount being consistent with a verdict returned by the jury on January 28, 1981. The Court has also awarded interest on 60 percent of the amount of the award from date of filing of this final judgment and on 40 percent from date of judicial demand. The Judgment also provides, among other things, that liability be apportioned among the defendants in accordance with their comparative degree of fault as further found by the jury: Coating Specialists, Inc. – 36%; Land and Marine Applicators, Inc. – 24%; Pulmosan Safety Equipment Corporation – 17%; Clemco, Inc. – 23%.

Defendants oppose the Court's granting joint and several liability in favor of plaintiff against the defendants. They urge, instead, a rule of severable liability against them. We agree that " . . . the general principle in

admiralty [] requires contribution between those jointly at fault or jointly responsible." Adams v. Texaco, Inc., 640 F.2d 618, 621 (5th Cir.1981); United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1974). This requires that, unless fault is found to be equal or is not capable of being fairly measured, liability among the parties is to be allocated proportionately to their comparative degree of fault. United States v. Reliable Transfer Co., *supra*. On the other hand, we do not see this principle as being inconsistent with the apparently equally general one "... that an innocent libelant in Admiralty, as a plaintiff in common law, is entitled to hold each of the wrongdoers jointly and severally liable for his injuries." Pennsylvania Railroad Company v. The Beatrice, 275 F.2d 209, 212 (2d Cir.1960). And, as further stated by the court in Burns Brothers v. The Central R. R. of New Jersey, 202 F.2d 910, 914 (2d Cir.1953), "in the Admiralty, as at common-law, every tortfeasor is liable *in solido;* and the rule allowing contribution between the two does not affect the liability of each to the party injured."

The foregoing would apply to Coating Specialists, Inc. and Land and Marine Applicators, Inc., who were found liable to plaintiff under the Jones Act, 46 U.S.C. § 688. However, the same result would be equally as applicable to the other two defendants, Pulmosan Safety Equipment Corporation and Clemco, Inc., who were sued by plaintiff in diversity and were found liable under Louisiana general tort law, i.e., negligence and products liability. Under the law of Louisiana, "[l]iability *in solido* ordinarily results when tortfeasors cooperate in a joint venture to cause harm. *Rush v. Town of Farmerville,* 1924, 156 La. 857, 101 So. 243. It can also be imposed upon persons who are strangers to each other but who have each contributed to

bringing about the same wrong, as in the case of concurrently yet independently negligent actors. *Reeves v. Louisiana & A. Ry. Co.*, La.Sup.Ct.1973, 282 So.2d 503, La.App., *on remand*, 304 So.2d 370." Equilease Corp, v. Smith Intern., Inc., 588 F.2d 919, 923 (5th Cir.1979). Furthermore, it has been held that when this occurs, "the plaintiff . . . is not concerned with the question of the degree of negligence as between the co-defendants, or their respective rights inter sese." Abrego v. Tri-State Transit Co., 22 So.2d 681, 682 (La.App.1st Cir.1945).

Plaintiff also contends that he is entitled to interest on the jury award from date of judicial demand. He is entitled to this under Louisiana law, LSA-R.S. 13:4203. However, under the Jones Act, interest is allowed in personal injury claims only from the date of the filing of the final judgment. Norris, The Law of Seamen, § 698, p. 423. Plaintiff relies on the case of Doucet v. Wheless Drilling Co., 467 F.2d 336 (5th Cir.1972). In this Jones Act case the court did hold that an award of pre-judgment interest was discretionary with the court, but in that case the suit was tried to the court in admiralty. Here the suit was tried at law to a jury and we, therefore, do not think that *Doucet* is applicable. However, we see no obstacle to applying both rules. As to that percentage of the award which the jury apportioned to the diversity defendants – 40 percent – interest should run from date of judicial demand, and as to that percentage apportioned against the Jones Act employers – 60 percent – interest should run from date of judgment.

Accordingly,

IT IS THE ORDER OF THE COURT that judgment be rendered in favor of plaintiff, William A. Scarborough, *in*

solido against the defendants, Coating Specialists, Inc., Land and Marine Applicators, Inc., Pulmosan Safety Equipment Corporation and Clemco, Inc., and further that as to 40 percent of the award, interest should run from date of judicial demand and as to 60 percent from date of final judgment.

/s/ Frederick J. R. Heebe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM A. SCARBOROUGH	CIVIL ACTION
versus	NO. 77-2523
NORTHERN ASSURANCE COMPANY OF AMERICA, et al.	SECTION B

(Filed Dec. 22, 1981)

The Court has before it post-trial motions filed by three of the defendants in this action, Land & Marine Applicators, Inc., Pulmosan Safety Equipment Corp. and Clemco, Inc. First, Land & Marine Applicators asks that the Court reconsider and reverse its decision on a previous motion brought by Lloyd's of London, London Companies and Harbor Insurance Company. It was decided that an excess insurer may avail itself of an exclusion contained in the primary policy when such exclusion is incorporated only by reference in the excess insurer's policy. This conclusion was reached by the Court in construing a 1976 Louisiana legislative amendment to LSA-R.S. 22:628 as having retroactive effect. Because Land & Marine has not raised any new arguments which convince us that our first decision was incorrect, we adhere to the previous decision.

Land & Marine, Pulmosan and Clemco have also filed motions for judgment notwithstanding the verdict, for a new trial and/or for remittitur. Among other matters raised, it is claimed that the judgment of the jury was contrary to the law and the evidence in that there was not sufficient evidence to support a verdict in favor of plaintiff and that, even if there was, the amount of the verdict was excessive. Land & Marine also challenges seaman status

of plaintiff with respect to it and the finding that plaintiff contracted silicosis while in its employ. The Court has reviewed the record and, based on its best recollection, has reconsidered the evidence presented at trial and is convinced that there is no just reason to disturb the jury's verdict. Consequently, all of these motions will be denied.

On June 18, 1981, this Court held that all four defendants in this suit who were found by the jury to be proportionately at fault for plaintiff's injury, Coating Specialists, Inc., Land & Marine Applicators, Inc., Pulmosan Safety Equipment Corporation and Clemco, Inc., were liable, *in solido,* on the judgment. The jury had apportioned their fault at 36% for Coating Specialists, 24% for Land & Marine, 17% for Pulmosan and 23% for Clemco. The Court has also been asked, by motions of Land & Marine, Pulmosan and Clemco, to reconsider and reverse this decision which casts them jointly and severally liable on the judgment. In most cases, as among multiple tortfeasors who are all before the court, this holding would not present a practical problem as each defendant would contribute its proportionate share of the damages owed to the plaintiff according to the verdict rendered by the jury. In the present case, however, Coating Specialists is insolvent and uninsured and the real issue is whether the loss of its 36% share of the $650,000 judgment should fall on plaintiff or on the remaining three defendants. Because this question has not been squarely answered in the admiralty area with respect to personal injury cases, the Court has taken a second look at it but is not convinced that it should change its prior ruling.

Basically, the defendants still maintain that the holding of United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 411 (1975), which now applies proportionate

fault, rather than mutual fault, in admiralty collision cases in situations where more than one defendant is found to have caused the plaintiff's injury, is controlling on this issue. It is their position that the holding of *Reliable Transfer* which apportions fault among the defendants is incompatible with a right in plaintiff to collect on a judgment *in solido,* that is, jointly and severally, as to the defendants. They appear to take the position that the right of a plaintiff to be able to enforce a judgment jointly and severally against two or more defendants and the right of the defendants to have their liability as to each other determined with respect to their proportionate fault are mutually exclusive. We do not agree.

At least one court was able to make this distinction which defendants object to, however, prior to the Supreme Court holding in *Reliable Transfer,* In Pennsylvania Railroad Company v. The Beatrice, 275 F.2d 209, 212-213 (2d Cir.1960), cited in our prior decision, the court unqualifiedly stated that:

> There is no doubt that an innocent libelant in admiralty, as a plaintiff at common law, is entitled to hold each of the wrongdoers jointly and severally liable for his injuries. In consequence, any of the respondents here who were sued *in personam,* or either of the vessels *in rem*, at least to the extent of its value, could have been held liable *in solido* for the entire damages if it had been sued separately. The fact that all of the offending interests were before the court in a single suit does not limit the libelant's right against each. [Citations omitted.] But in determining the incidence of the loss as between the wrongdoers, the court will apportion it equally among all, in a decree which provides that so much of the loss as

> is unenforceable from the one against whom it was assessed may be collected from the others. Thus the maritime notion that justice requires that wrongdoers shall bear the loss in equal parts is given effect in so far as possible, with provision for the protection of the innocent libelant. . . . That here two of the wrongdoers are vessels while the third is an individual is a fortuitous circumstance which affects neither the libelant's right nor the respondents' liabilities.

Furthermore, this is demonstrably what the law has been for many years in the admiralty jurisprudence up to *Reliable Transfer.* In the ancient case of The Atlas, 93 U.S. 302 (1876), the Supreme Court stated in clear terms that:

> the rule of the common law and of the admiralty is the same where the suit is promoted by an innocent party, except that the moiety rule may be applied in the admiralty, if all the parties are before the court, *and each of the wrong-doers is able to respond for his share of the damage. Subject to that qualification,* the remedy of the innocent party is substantially the same in the admiralty as in an action at law, the rule being, that in both he is entitled to an entire compensation from the wrong-doer for the injury suffered by the collision. *Supra* at 317. [Emphasis added.]

The Atlas has been cited for the broad proposition that "in admiralty, as at common law, every tort-feasor is liable *in solido*; and the rule allowing contribution between the two does not affect the liability of each to the party injured." Burns Bros. v. The Central R. R. of New Jersey, 202 F.2d 910, 914 (2d Cir.1953). *The Atlas,* as did *Reliable Transfer,* dealt with admiralty law as it pertains to property damage resulting from a collision involving vessels. However, the

parties agree that the law of *Reliable Transfer* is equally applicable to this case involving personal injury under admiralty law. See Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1248 (5th Cir.1979); Hogge v. S.S. Yorkmar, 434 F.Supp. 715, 728 (D.Md.1977).

Most recently, in Edmonds v. Compagnia General Transtl., 443 U.S. 256, 272 fn.30 (1978), the Supreme Court again used language which indicates to us that defendants' position is in-correct. It noted that:

> Even before *Reliable Transfer,* we apportioned damages between vessels that collided and sued one another. *Reliable Transfer* merely changed the apportionment from equal division to division on the basis of relative fault. But we did not upset the rule that the plaintiff may recover from *one* of the colliding vessels the damage concurrently caused by the negligence of both.

The Court in *Edmonds* held that where a longshoreman is injured by the joint negligence of the stevedore and the shipowner, the shipowner can be made to pay all of the damages not due to the plaintiff's own negligence even though plaintiff cannot sue the stevedore and even though the shipowner cannot get contribution against the stevedore, both pursuant to 33 U.S.C. §905(a). Although we find this decision relevant, it is not controlling, There was no issue of joint and several liability since the stevedore has statutory immunity from tort liability. However, even though it recognized that there was no right to a *Reliable Transfer* contribution against the stevedore for the proportion of its fault, the Court pointed out that:

> Contribution remedies the unjust enrichment of the concurrent tortfeasor, . . . and while it may sometimes limit the ultimate loss of the tortfeasor

> chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched. *Edmonds, supra* at 272 fn.30.

The suit before us is unquestionably in admiralty as to the two defendants Coating Specialists and Land & Marine Applicators, who were sued under the Jones Act as employers of the plaintiff. Koesler v. Harvey Applicators, Inc., 416 F.Supp. 872, 874 (E.D.La.1976). The other two defendants, Pulmosan Safety Equipment Corporation and Clemco, Inc., are the manufacturers of the masks that plaintiff's employers had purchased for use by its employees while sandblasting. These defendants assert that the claims against them are also under the maritime law. Plaintiff, on the other hand, insists that the actions against these two defendants are in diversity. The question before us is whether the defendants' manufacture and sale of sandblasting and other types of industrial masks, used but not specifically manufactured for use on a vessel during sandblasting operations, meets the "locality-plus" test set forth in Executive Jet Aviation, Inc., v. Cleveland, 409 U.S. 249 (1972). At least two relevant cases have dealt with similar situations and have held that admiralty jurisdiction existed. In White v. Johns-Manville Corp., 50 LW 2230 (4th Cir., 10/5/81), a product liability action was brought against the manufacturer of asbestos insulation materials which plaintiffs had installed during ship construction work performed both in the shipyard and dry dock areas and aboard the vessels while they were located on navigable waters. The court held that admiralty jurisdiction would apply in this case even though the allegedly defective product was not unique to maritime use "since the evidence presented at trial clearly established that the materials used by these shipyard workers were designed,

advertised, and marketed as maritime asbestos products." *Supra* at 2231. There is no similar evidence in the case before us. In an earlier Fifth Circuit decision, Sperry Rand Corp. v. Radio Corporation of America, 618 F.2d 319 (5th Cir.1980), the court applied admiralty law in a product liability case also involving a defective product which was limited to maritime use. In the *Sperry Rand* case, the court held that manufacturers of component parts utilized on vessels will be subject to admiralty jurisdiction even if those parts are not manufactured exclusively for marine use. However, the court found that "the plaintiff's predecessor in interest was engaged in maritime activity, the injury was upon a vessel, the location of the injury was on navigable waters, and the instrumentality causing the injury was defective components in a marine steering mechanism." The facts in *Sperry Rand* also provided a strong connection to traditional maritime activity beside the mere locality of injury on navigable waters. In the case before us, there has been no evidence that sand-blasting is a peculiarly maritime activity, unless one is to carry it one step further and look only at the fact that this was sand-blasting off of vessels. It appears to us that this is a close case, but one which we are willing to concede in favor of defendants for purposes of deciding the issue before us because, given the result which we reach, we do not think that the decision would be different if we apply admiralty law rather than Louisiana law under diversity jurisdiction. See Kirtland v. J. Ray McDermott & Co., 568 F.2d 1166, 1171 (5th Cir.1978).

In applying admiralty law to the case before us, we conclude that the adoption of comparative fault as the measure of liability among multiple wrongdoers is not inconsistent with the notion of solidary, joint and several,

liability to the plaintiff. It has been pointed out by one court, Payton v. Abbott Labs, 512 F.Supp. 1031, 1036 (D.Mass.1981), that the doctrine of joint and several liability "is more a rule of damages than of liability; the doctrine comes into effect only after a plaintiff can prove all of the elements of the tort against every defendant." Furthermore, as pointed out by the dissent in the *Edmonds* case, *supra* at 275 fn.2, the common-law rule of joint and several liability specifically is based on a policy which "serves largely to protect plaintiffs from defendants who are unable to pay judgments entered against them." This is precisely the situation before us.

In support of their position, defendants rely on recent decisions which resolve a similar problem created when a plaintiff settles with one of several tortfeasors prior to trial. It has been held that a plaintiff's recovery against a non-settling defendant will be reduced by an amount attributable to the settling defendant's proportional fault rather than the actual amount paid to plaintiff by the settling defendant, which may be considerably less than the settling defendant's liability would have been if there had been no settlement. This rule is applicable whether the amount paid by the settling defendant is considerably less than the settling defendant's liability would have been if there had been no settlement, Kizer v. Peter Kiewit Sons' Co., 489 F.Supp. 835 (N.D.Calif.1980), or whether the settling defendant has settled with plaintiff for more than its proportionate share of the total damages awarded to plaintiff would have been, Leger v. Drilling Well Control, Inc., *supra*. We do not find that the law prevailing in a settlement context should be controlling here. The court in *Leger* stresses the policy behind its decision as being one of encouragement of settlements as the final factor. To

this end, the court is willing to protect the aleatory aspect of the settlement process. The plaintiff must live with the bargain he has agreed to, good or bad. The court in *Kizer, supra,* also articulated a rule which would hold both the plaintiff and the settling defendant to their contract, aleatory in nature as it may be. Moreover, the court in *Kizer* had no trouble in distinguishing *Edmonds,* even though it noted that the Supreme Court recognized "the common law of torts for the rule that a plaintiff may recover the full amount from any joint tortfeasor, regardless of the degree of negligence." *Kizer, supra* at 840. To the *Kizer* court, *Edmonds* simply dictated the necessity of referring to the common law to determine the effect of a *settlement* with one tortfeasor in a maritime case governed by the rule of proportional damage. This presented a unique issue. However, the resolution of it should not be controlling in our case. As stated by the court in Doyle v. United States, 441 F.Supp. 701, 710 (D.S.C.1977), in admiralty, *"[a]bsent a settlement with one defendant,* the liability of tort-feasors is joint and several, and the innocent plaintiff can recover his full damages from either tortfeasor." (Emphasis added.) We conclude that this is the better rule where, as here, the plaintiff has no control over the solvency of the defendant tortfeasors found liable to him, unlike the degree of control a plaintiff has with regard to entering into a settlement with a particular defendant. To place the financial burden of the insolvency of one of the defendants on the innocent plaintiff rather than on the other defendant tortfeasors would not be a just result, See, e.g., Lentz v. Freeman Associates Caribbean, Inc., 441 F.Supp. 892, 895 (D.St.Thomas and St.John 1977).

Defendants have argued that since the jury apportioned fault, they found that plaintiff sustained a divisible injury and each defendant should only be liable for its own percentage of the harm which it caused and no more. What these defendants are doing is equating the principle of comparative fault with the principle of divisibility of an injury where the causation of each part of the injury can be separately assigned to each tortfeasor. The Court in *Edmonds* noted that admiralty law is in accord with the common law as stated in the Restatement (Second) of Torts §§433A, 875 and 879 (1965 and 1979). The latter principle referred to is covered, as noted in *Edmonds, supra* at 260 and 261, by the Restatement (Second) of Torts §433A. Section 433A provides, in pertinent part, that:

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

We do not think that this section is applicable to the case before us or that we have divisible harm in this cumulative, progressive lung disease case. The comparative or proportionate fault which the jury found specific percentages for as to each defendant was for the purpose of determining the amount of contribution among the tortfeasors, which is set forth in §886A of the Restatement. This section reads, in pertinent part, that:

> (1) [W]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even

> though judgment has not been recovered against all or any of them.
>
> (2) The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share, No tortfeasor can be required to make contribution beyond his own equitable share of the liability.

Under the Comment to section (2), the Restatement, *supra* at 340, notes that "equitable shares" for purposes of contribution can most fairly be based on the comparative fault of the tortfeasors by ascertaining percentages of fault. And further on in the Comment at section (i), *supra* at 341, in discussing the procedure for obtaining contribution, it is noted that:

> If a plaintiff joins all tortfeasors liable for the harm in a single suit, he may obtain a judgment against them jointly and severally for the full amount of his damages. [] In a pro-rata state, each tortfeasor will know what his ultimate liability will be. In a comparative contribution state, if the procedural rules authorize it, the trier of fact should indicate the relative fault of each of the parties and the judgment should designate the "equitable share" (the ultimate responsibility) of each.

Reliable Transfer is consistent with this in that it makes a "comparative contribution state" for purposes of this case a personal injury suit in admiralty. Even if we were to agree, which we do not, that the jury apportioned the harm caused, as covered by § 433A, rather than the ultimate

degree of responsibility, it is interesting to note that Comment (h) under § 433A, *supra* at 439, points out that:

> Exceptional cases may, however, arise in which injustice to the plaintiff may result from an application of the rule. It may, for example, appear that one of two tortfeasors is so hopelessly insolvent that the plaintiff will never be able to collect from him the share of the damages allocated to him. . . . In such cases the application of the rule stated in Clause (b) would mean that the innocent plaintiff would be forced to bear the share of the loss due to the defendant from whom he could not collect the damages, and the liability of the other tortfeasor would be reduced accordingly. Nothing in this Section, or in the Comments, is intended to say that the court may not, in a case where justice requires it, refuse to apply the rule stated in Clause (b).

If we found this section applicable, Clause (b) would apply to the situation before us and, even then, the Comment indicates that under our facts we would be free to disregard it.

The final issue before us is the awarding of interest. Defendants Clemco and Pulmosan maintain that the product liability actions against them are under the maritime law, in admiralty, and, therefore, the question of interest is to be determined according to federal law rather than state law, as was done by this Court with respect to them. Even accepting their position as correct, we do not think that we are precluded from awarding prejudgment interest as to the claims against these defendants. Although they cite 28 U.S.C. § 1961 as precluding prejudgment interest, this statute does not control the issue of prejudgment interest, as it only provides for interest on

money judgments from the date of entry. As stated most recently by the Fifth Circuit, on July 8, 1981, in Ellis v. Chevron U.S.A. Inc., 650 F.2d 94, 98:

> Section 1961 provides that interest will be calculated "from the date of the entry of judgment." This Circuit has held, however, that the language of § 1961 does not preclude the awarding of prejudgment interest. . . . The general rule of this Circuit is that the awarding of prejudgment interest is in the discretion of the court. *Payne v. Panama Canal Co.*, 607 F.2d 155, 166 (5th Cir.1979).

The *Payne* case cited by the court lists claims as to which, there being no statutory provision to the contrary, the award of prejudgment interest is discretionary with the court. Admiralty claims are included in the list. We have exercised our discretion to award prejudgment interest as to the product liability claims and see no reason to alter it at this time.

For the foregoing reasons, supplemented with what has previously been said in the decision of this Court dated June 18, 1981,

IT IS THE ORDER OF THE COURT that the post-trial motions filed by defendants Land & Marine Applicators, Inc., Pulmosan Safety Equipment Corp. and Clemco, Inc., be, and the same are hereby, DENIED.

New Orleans, Louisiana
December 22, 1981 Frederick J.R. Heebe
UNITED STATES DISTRICT JUDGE

STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BARBARA SCARBOROUGH, ET AL	**CIVIL ACTION**
versus	**NO. 03-0087**
CLEMCO INDUSTRIES a/k/a CLEMCO-CLEMINTINA LTD, ET AL	**SECTION "C" (1)**

FINAL JUDGMENT

(Filed Oct. 2, 2003)

On May 16, 2003, this Court entered Order and Reasons adjudicating various motions to dismiss and/or motions for summary judgment submitted by different parties in this matter.

In its Order and Reasons, this court found that non-pecuniary damages were not available in this case to the plaintiff pursuant to *Miles v. Apex Marine Corporation*, 498 U.S. 19, 111 Supreme Court 317, 112 L.Ed. 2d 275 (1990), therefore only pecuniary damages were available to the petitioners against the defendants.

Since that time, the pecuniary damage claim has been settled. Therefore, all damages available pursuant to the Order and Reasons of May 16, 2003 have been settled.

For the above stated reasons, therefore this Court now enters a full and final judgment pursuant to the Order and Reasons of May 16, 2003 dismissing plaintiff's claims with prejudice, each party to bear its own costs.

New Orleans, this 1st day of October, 2003.

/s/ Helen G. Berrigan
Judge Helen G. Berrigan,
USDC

Respectfully Submitted,
JACOBS, MANUEL & KAIN
(A Group of Law Corporations)

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record by placing same in the U.S. Mail, postage, prepaid, this 1 day of October, 2003.

/s/ Jodi J. Aamodt
Jodi J. Aamodt

45 U.S.C. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

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46 U.S.C. § 688

§ 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

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28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BARBARA SCARBOROUGH, RHONDA SCARBOROUGH HALTERLEIN AND WILLIAM SCARBOROUGH JR. all individually and on behalf of the decedent WILLIAM A. SCARBOROUGH VERSUS CLEMCO INDUSTRIES a/k/a CLEMCO-CLEMINTINA LTD; PULMOSAN SAFETY EQUIPMENT COMPANY, ACE USA Formally Known as CENTURY INDEMNITY COMPANY; AMERICAN HOME INSURANCE COMPANY; INTERSTATE INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; NEW ENGLAND MANAGEMENT COMPANY Formally Known as NEW ENGLAND REINSURANCE COMPANY; SCOTTSDALE INDEMNITY CO. Formally known as NATIONAL CASUALTY COMPANY	CIVIL ACTION NO. 03-0087 SECTION SECT. C MAG 1

COMPLAINT

(Filed Jan. 10, 2003)

Now comes plaintiffs, BARBARA SCARBOROUGH, RHONDA SCARBOROUGH HALTERLEIN AND WILLIAM SCARBOROUGH JR. all individually and on behalf of the decedent WILLIAM A. SCARBOROUGH, stating causes of action pursuant to the Louisiana general tort law, survival and wrongful death actions pursuant to La.

C.C. 2315.1 and 2315.2, diversity of citizenship and jurisdictional amount and the Louisiana Direct Action Statute, who with respect represent:

I.

Plaintiffs are all persons of the full age of majority and residents of the City of Pass Christian, State of Mississippi, who assert a survival action and wrongful death claim on behalf of the decedent William A. Scarborough, who expired on March 21, 2002. Plaintiff Barbara Scarborough is the wife of the decedent and plaintiffs Rhonda Scarborough Halterlein and William Scarborough Jr. are the major children of the decedent

II.

This matter was tried before a jury in this Court, civil action number 77-2523 "B" before the Honorable Frederick J.R. Heebe and a judgment was rendered on June 18, 1981, in favor of the decedent, William A. Scarborough in the amount of $650,000.00. The judgment read as follows:

> IT IS ORDERED ADJUDGED AND DECREED THAT THERE BE JUDGMENT HEREIN IN THE FAVOR OF THE PLAINTIFF WILLIAM A SCARBOROUGH AND AGAINST DEFENDANTS, COATING SPECIALIST INC., LAND & MARINE APPLICATORS INC., PULMOSAN SAFETY EQUIPMENT CORPORATION AND CLEMCO INC., JOINTLY AND IN SOLIDO, IN THE FULL SUM OF SIX HUNDRED FIFTY THOUSAND ($650,000.00) DOLLARS, TOGETHER WITH LEGAL INTEREST THERON [sic] FROM DATE OF THIS JUDGMENT AS TO 60% OF IT AND FROM DATE OF JUDICIAL

DEMAND AS TO 40% OF IT AND ALL COSTS OF THESE PROCEEDINGS.

III.

The Court found that all four defendants in the suit were proportionally at fault for the decedent's injuries, Coating Specialists, Inc., Land & Marine Applicators, Inc., Pulmosan Safety Equipment Corporation and Clemco, Inc., and were liable, in solido on the judgment. The jury when apportioned their fault as follows:

Coating Specialists, Inc.	36%
Land and Marine Applicators, Inc.	24%
Pulmosan Safety Equipment Corporation	17%
Clemco, Inc.	23%

IV.

The Jones Act employers got out on the 36 month provision with the result of defendants Pulmosan Safety Equipment Corporation and Clemco Industries, a/k/a Clemco-Clementina, Ltd., paying off the judgment.

V.

Plaintiff therefore pleads the federal doctrine of collateral estoppel, that since this issue has been determined by a court of competent jurisdiction, that the previous determination is conclusive in the present matter based on this new cause of action involving the same parties to the prior litigation.

VI.

Plaintiffs further aver that at the time that Coating Specialists, Inc. was a Louisiana corporation authorized to do and doing business within the Eastern District of Louisiana. Said corporation has been discharged in bankruptcy.

VII.

From approximately 1958 through June, 1963, the decedent was employed by Coating Specialists, Inc., bankrupt, as a sandblaster/painter and/or foreman and member of the crew of vessels owned by that corporation with substantial work performed on permanent fixed platforms both in Louisiana and in federal waters.

VIII.

Land & Marine Applicators was a Louisiana corporation authorized to do and doing business within the Eastern District of Louisiana. Said corporation has been discharged in bankruptcy.

IX.

From some point in 1963 through approximately the end of November, 1967, plaintiff was employed by Land & Marine Applicators, Inc., bankrupt, as a seaman and as a sandblaster/painter and/or foreman and member of the crew of certain vessels owned by that corporation with substantial work performed on permanent fixed platforms both in Louisiana and in federal waters.

X.

On information and belief, defendants, Pulmosan Safety Equipment Company and Clemco Industries a/k/a Clemco Clementina, Ltd., at various times between 1958 and 1967 furnished Coating Specialists Inc. and Land & Marine Applicators, Inc., with equipment and materials to be used in sandblasting operations which are inherently defective and/or negligently manufactured and/or which were provided by those corporations to those defendants, and to the decedent without proper instruction for its use. These defendants were therefore negligent and are responsible for the defective design, manufacture and distribution of their products.

XI.

Defendants, ACE USA formally known as Century Indemnity Company, American Home Insurance Company, Interstate Insurance Company, First State Insurance Company, New England Management Company formally known as New England Reinsurance Company, and Scottsdale Indemnity Company formally known as National Casualty Company are all foreign insurance companies authorized to do business and doing business within the State of Louisiana and within the jurisdiction of this Court, all of which defendants at various times pertinent hereto provided a policy or policies affording insurance coverage to Pulmosan Safety Equipment Company, said policies covering the causes of action and damage in connection therewith sought by these plaintiffs herein.

XII.

Said defendants are therefore liable jointly, severally and in solido for the negligence described hereinabove.

XIII.

Plaintiffs further allege that since these inherently dangerous and/or defective products furnished by the defendants Pulmosan Safety Equipment Company and Clemco Industries a/k/a Clemco Clementina, Ltd. were utilized by the decedent on permanent platforms, this matter is to be controlled by the application of Louisiana law as was determined in the original petition in Civil Action No. 77-2523 "B."

XIV.

As between these plaintiffs and defendants, there is diversity of citizenship and plaintiffs' claims exceed the value of TEN MILLION AND NO/100 ($10,000,000.00) DOLLARS, exclusive of interest and costs.

XV.

The Court has jurisdiction over the defendants Pulmosan Safety Equipment Company and Clemco Industries a/k/a Clemco-Clementina, Ltd., pursuant to 28 U.S.C. 1332.

XVI.

The Court has jurisdiction over all of the insurance company defendants named herein pursuant to 28 U.S.C.

Section 1332 and the Louisiana Direct Action Statute, L.S.A.-R.S. 22:655.

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AND

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PLEASE SERVE:

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C/o Clint Phillips
Johnson, Ferguson Pipkin & Phillips
4900 Woodway, Suite 1100
Houston, Texas 77056

Clemco Industries a/k/a Clemco-Clementina Ltd.
2177 Jerrold Avenue
San Francisco, CA 94124
Through the Louisiana Long Arm Statute

ACE USA Formally Known as Century Indemnity Company
THRU THE SECRETARY OF STATE
FOR THE STATE OF LOUISIANA
Baton Rouge, LA

American Home insurance Company and/or
American Home Assurance Company
THRU THE SECRETARY OF STATE
FOR THE STATE OF LOUISIANA
Baton Rouge, LA

Interstate Fire & Casualty Insurance Company
THRU THE SECRETARY OF STATE
FOR THE STATE OF LOUISIANA
Baton Rouge, LA

EXCERPTS FROM TRIAL TRANSCRIPT
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

WILLIAM A. SCARBOROUGH	*	CIVIL ACTION
VERSUS	*	NO. 77-2523
NORTHERN ASSURANCE COMPANY OF NORTH AMERICA, ET AL	*	SECTION "B"

* * *

EXCERPT TRIAL TESTIMONY – WILLIAM SCARBOROUGH

[579] Q The sandblasting was done on the rigs themselves, is that right?

A Yes, sir.

Q You had to get on the rig to sandblast?

A Yes, sir, unless we were working around the edge of the water line, we occasionally blasted off of the boat.

Q But most of the work was done on the rigs?

A The majority, yes.

Q So, if we could understand, the ladies and gentlemen of the jury could understand, we have, we have a boat, for example, the L&M tied along side a rig, the pots with the sand and the sand are on the boat, the helpers are on the boat, and running from that boat are the lines

to the rig, where all of the sandblasters are doing the work, is that basically the set-up that you had?

A Yes, sir.

Q So the purpose of the L&M or the BIG RED, depending on which, whatever boat you were on, was to, in effect, support the sandblasting activity that was being done on the rig?

MR. WIEDEMANN: May it please your Honor, Mr. Caruso is testifying now. If he wants to ask a question –

MR. CARUSO: This is cross-examination, your Honor, and Mr. Wiedemann asked witnesses several times who was the duty of the boat, then I am going to ask him as [580] well, I have a right on cross-examination to ask him a question like that.

MR. WIEDEMANN: I suggest that the witness – these are terms that this man is using. If he asks the witness what did the boat do, that's another story.

MR. CARUSO: Your Honor –

THE COURT: I didn't hear the question.

MR. CARUSO: My question was, that the vessels of which you were working, the duty of those vessels, the mission of the vessel was to support the sandblasting activity on the rig and this is cross-examination in relation to Mr. Wiedemann's questions of what was the duty of the boat.

THE COURT: Objection overruled.

BY MR. CARUSO:

Q So my question – you want to know the question, Mr. Scarborough?

A Repeat it again, please.

Q These boats that you were working on were, the mission of those vessels were to support the sandblasting activity that was going on on the rigs, isn't that correct?

A Yes, everything came off of the boat, right, yes, sir.

Q Now, you testified earlier, and have testified, that you did, in fact, operate or navigate the boats for

* * *

EXCERPT TRIAL TESTIMONY –
JOHN WILLIAM LOERWALD

[1229] vessels, sleep on the vessels, that you owned?

A Would you repeat that, please?

Q During the period of time that these people worked for you in '63 through '67 at Land and Marine –

THE COURT: He is talking about the sandblasters.

BY MR. WIEDEMANN:

Q Sandblasters, engaged in the offshore sandblasting activity, didn't they go out on vessels and work on rigs from the vessels or on the rigs themselves and live aboard the vessels as they worked offshore?

A They lived aboard the vessels, but they worked on the structures. When you are sandblasting a piece of steel, you cannot be any further than eighteen inches away from

the steel, so it would be pretty hard to blast structure from the boat.

Q And were those boats either owned or leased by you, sir?

A Yes, sir.

Q And were the boats that the sandblasters worked aboard, that is, Coating Specialists, either owned or leased by Coating Specialists?

A Well, the sandblasters didn't work on the boat they worked on the structure.

Q In the same capacity that they were involved with the vessel with Land and Marine, were not the vessels

* * *

(2)

Supreme Court, U.S.
FILED
MAR 17 2005
OFFICE OF THE CLERK

No. 04-1103

In The
Supreme Court of the United States

BARBARA SCARBOROUGH, Individually and on behalf of decedent, William A. Scarborough; RHONDA SCARBOROUGH HALTERLEIN, Individually and on behalf of decedent William A. Scarborough; WILLIAM SCARBOROUGH, JR., Individually and on behalf of decedent, William A. Scarborough,

Petitioners,

versus

CLEMCO INDUSTRIES INC., also known as Clemco-Clemintina Ltd.; PULMOSAN SAFETY EQUIPMENT COMPANY; CENTURY INDEMNITY COMPANY, as successor to CCI Insurance Company as successor to Insurance Company of North America; AMERICAN HOME ASSURANCE CO., AND INTERSTATE INSURANCE COMPANY

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Clemco Industries Corp., is a privately held corporation, incorporated in and with its principal place of business in the State of Missouri. No parent or publicly held company owns 10% or more of Clemco Industries Corp. stock.

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STATEMENT OF THE CASE

In 1977, William Scarborough brought a civil action (Scarborough I), in the United States District Court for the Eastern District of Louisiana against his former employers, Coating Specialists, Inc. and Land & Marine Applicators, Inc. He also sued Clemco Industries Corp. (Clemco), and Pulmosan Safety Equipment Co. (Pulmosan). Scarborough claimed that he contracted silicosis as a result of the defendants' combined fault in providing him with defective protective hoods he wore while sandblasting aboard his employers' vessels. At trial, the jury found that he was a seaman and that the vessels operated by his negligent Jones Act employers were unseaworthy because the hoods were defective. *Scarborough v. Clemco Industries*, 391 F.3d 660, 662 (5th Cir. 2004) (App. p. 3).[1]

The matter presently before this Court (Scarborough II), is a wrongful death action brought by Mr. Scarborough's survivors resulting from his death from respiratory failure caused by silicosis on March 21, 2002. *Id.* The Petitioners are bound by the finding in Scarborough I, that their decedent was a seaman and that his claims arose under maritime law. The action of the lower courts in this case is succinctly set forth in the opinion of the United States Court of Appeals for the Fifth Circuit. A brief synopsis is set forth in the text of footnote 2, below.[2]

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[1] Citations to "App." are to the numbered pages of the appendix set forth in the Petitioner's writ application.

[2] The Scarborough II court, in an order addressing various cross motions for dismissal and summary judgment, made the following pertinent findings:

(Continued on following page)

A single question is presented for this Court's review, namely, may the survivors of a seaman recover non-pecuniary damages in a general maritime wrongful death action brought against a non-employer?

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1. Appellants' cause of action against Clemco and Pulmosan for wrongful death arises under maritime law and is subject to federal admiralty jurisdiction.
2. Appellants are precluded by collateral estoppel from arguing that Scarborough was not a Jones Act seaman.
3. Under the uniformity principle announced in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29, 111 S. Ct. 317, 112, L. Ed. 2d 275 (1990), a Jones Act seaman and his survivors may not recover non-pecuniary damages in a wrongful death suit against a non-employer third party. . . .

264 F.Supp. 2d at 447. The motions for dismissal and summary judgment were denied in the district court's Order and Reasons entered on 16 May 2003 because there were material issues of fact in connection with Appellants' pecuniary damages claims that were in dispute. *Id.* After the pecuniary damages claims were settled, however, the motion to dismiss was granted by the district court in its Final Judgment entered on 1 October 2003.

Appellants now appeal two legal conclusions, contained in the district court's Order and Reasons, based upon which it later dismissed Appellants' claims:

1) Appellants' claims against Clemco, Pulmosan, and Century are subject to federal admiralty jurisdiction.
2) A Jones Act seaman's survivors may not recover non-pecuniary damages against a non-employer third party in a maritime wrongful death action.

As explained below, we affirm the trial court. *Scarborough v. Clemco Industries*, 391 F.3d 660, 662-663 (5th Cir. 2004) (App. pp. 4-5).

STATEMENT OF RELEVANT FACTS

Petitioners recite numerous facts at pages 5-9 of their petition, however, many of the facts recited are not relevant to the issue presented. Specifically, excerpts of selected testimony alleging that most of Mr. Scarborough's work was performed on permanent oil platforms ignores the fact that in Scarborough I, William Scarborough actively and successfully sought Jones Act status. In Scarborough II, Respondents themselves successfully argued at trial and on appeal that Collateral Estoppel precluded relitigation of the findings upon which Mr. Scarborough had originally prevailed.

Because Mr. Scarborough's survivors no longer argue the inapplicability of maritime law, the case before the Court has been distilled to a wrongful death claim by a seaman's survivors against non-employer defendants.

SUMMARY OF THE ARGUMENT

The sole issue in this case, whether the survivors of a Jones Act seaman can recover non-pecuniary damages against non-employer defendants, has already been answered by implication by this Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990). Relying on *Moragne* and *Higginbotham*, as well as time-honored principles of statutory construction, this Court in *Miles* concluded that non-pecuniary damages such as loss of consortium and loss of society were not available to plaintiffs in a Jones Act wrongful death action. This Court properly gave effect to Congressional intent that uniform remedies be established in cases involving seamen, whether such cases are brought under the Jones

Act[3], DOHSA[4], or General Maritime Law. The lower courts in this matter correctly concluded that the principle of uniformity applied equally to employer and non-employer defendants.

Having abandoned ship on their previous arguments that maritime law does not apply to this case, Petitioners have set sail on locked rudders to argue policy considerations which ignore both this Court's previous opinions and role in upholding permissible Congressional expressions of public policy and uniformity. As correctly noted by the Fifth Circuit in its opinion below, it would be improper to allow the survivors of a Jones Act seaman to recover non-pecuniary damages when Congress has disallowed the identical kinds of damages in a Jones Act suit. Moreover, the effect on uniformity should this Court reverse the Fifth Circuit is obvious and need not be mentioned.

At the heart of the dispute is a public policy issue, namely, whether non-pecuniary damages should be allowed in these kinds of cases. But precisely because the essence of the matter is one dependent upon Congressional expressions of public policy, this Court should not abandon its role as an interpreter of laws to dive into the murky waters in which the relative merits of permissible Congressional action exist. As noted in Miles, the pertinent statutes clearly show that Congress thought it best that non-pecuniary damages not be allowed. Because Congress has acted broadly, unambiguously, and with clarity, there

[3] The Jones Act sets forth the cause of action for the death of a seaman. 47 U.S.C. § 688.

[4] DOHSA sets forth the cause of action on behalf of anyone who has died on the high seas, and claims may be pursued against non-employer defendants. 46 U.S.C. § 761.

is no admiralty rule-making which this Court should undertake since such action would result in encroachment upon Congressional prerogatives. Indeed, it is difficult to think of *any* action the Court could take within its authority to create substantive admiralty law to grant the relief requested by Petitioners which would not constitute such an encroachment. In this light, Petitioners' arguments boil down to a request that this Court act by taking on a role which the Constitution has specifically allotted to Congress.

On the issue presented, there is no conflict within the federal appellate circuits or with a state court of last resort. Petitioners note that there is some conflict between various district courts on the issue presented. However, such cases are heavily weighed in favor of decisions by district courts within the Fifth Circuit, not all of which support Petitioners' arguments. Following the Fifth Circuit's decision in Scarborough II, the district court cases in Texas and Louisiana, which did allow recovery, are no longer valid. Any new cases arising within the Fifth Circuit will be bound to follow Scarborough II.

Moreover, there is no conflict among the Circuits. Such a circumstance, if it existed, would give Petitioners' arguments considerably more heft. The only Circuits which have considered the issue, namely, the Fifth and the Ninth, are in agreement. See, *Scarborough v. Clemco Industries*, 391 F.3d 660 (5th Cir. 2004); and *Davis v. Bender Shipbuilding and Repair Co., Inc.*, 27 F.3d 426 (9th Cir. 1994), *cert. denied*, 513 U.S. 1000, 115 S. Ct. 510, 130 L. Ed. 2d 418 (1994). Notably, in *Davis* this Court denied certiorari when asked to consider the same issue presented here. The notion advanced by petitioners that there

is an urgent need to resolve the issue is simply not in accord with reality.

REASONS FOR DENYING THE WRIT

The Petitioners are bound by the findings in Scarborough I that their decedent was a seaman and that his claims arose under maritime law. Although they contested such findings at the Fifth Circuit in Scarborough II, their Petition no longer reflects that they pursue them.

This Court's decision in *Miles* instructs that the remedies available to a seaman, whether brought under the Jones Act, DOHSA, or general maritime law, preclude the recovery of non-pecuniary damages against both employer and non-employer defendants.

In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1172, 26 L. Ed. 2d 339 (1970), this court overruled *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886), creating a general maritime wrongful death cause of action, where the death of a seaman was caused by the negligence or unseaworthiness of a vessel. The Court's conclusion was prompted by a desire for uniformity in maritime actions whether brought under DOHSA, the Jones Act, or general maritime law. As stated by this Court, "... such uniformity will not only further the concerns of the 1920 Acts, but also will give effect to the Constitutionally based principle that federal admiralty laws should be a system of laws co-extensive with, and operating uniformly in the whole country." *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 400-401, 90 S. Ct. at 1788.

Eight years later, this Court, in *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978), addressed the issue of whether non-pecuniary damages were available in a wrongful death action under DOHSA. The plaintiffs in *Higginbotham* unsurprisingly made policy arguments similar to those made here by Petitioners. After addressing them, this Court stated, "We need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." *Id.* 436 U.S. at 623, 98 S. Ct. at 2014. Like the plaintiffs in *Higginbotham*, Petitioners have advanced policy arguments in support of their position that they are entitled to an independent cause of action based on state law, even though this case factually involves the wrongful death of a seaman. As noted by this Court in *Higginbotham*, policy arguments do not weigh on a court's decision when Congress has spoken. Specifically, this Court recognized that, "... Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements. There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Id.* 436 U.S. at 625, 98 S. Ct. at 2015.

Petitioners cite an article by Professor Robert Force, claiming that *Miles* may have been wrongly decided because maritime tort law is allegedly not "dominated" by statute, an assertion which is certainly open to debate. See, Petition, p. 24. In doing so, Petitioners ignore the fact that, where appropriate, this Court has allowed more liberal non-statutory remedies to co-exist alongside the historically more restricted remedies which have been

specifically spoken to by Congress. See, for example, *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 518 (1996). Thus, the lack of "domination" argument is equally flawed.

Petitioners seek a determination from this Court that, because the Jones Act applies to a seaman's employers only, *Miles* should not apply to a cause of action against a non-employer defendant. This argument ignores this Court's recognition that Congressional intent is well established to provide uniform remedies for cases involving seamen, whether under the Jones Act, DOHSA, or general maritime law, and that such intent shows that non-pecuniary damages are not favored.

In holding that there was no recovery for loss of society in a Jones Act wrongful death action, this Court reasoned that:

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman. *Miles v. Apex Marine Corp.*, 498 U.S. at 32-33, 111 S. Ct. at 325-326.

Further, in support of its holding that the estate could not recover for the decedent's loss of future earnings, this court stated:

> We sail in occupied waters. Maritime tort law is now dominated by federal statutes, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and

> those dependent upon them. Congress has placed limits and recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act. . . ."

Id. 498 U.S. at 36, 111 S. Ct. at 327-328.

Petitioners, at page 12, of their writ application, ask "why should a non-employer be given a free ride?" This policy argument does not displace the Congressional guidance contained within the Jones Act, DOHSA or this Court's opinions decided under the Acts and general maritime law. The fact of the matter is that Respondents were not given a "free ride." As noted by the district court, both Clemco and Pulmosan paid a significant portion of the employer's portion of the judgment, as the employers were insolvent. Moreover, as noted in Scarborough II, Respondents paid Petitioners' pecuniary losses. If it has been a "free ride," Respondents shudder at the possible cost of a first class ticket.

Petitioner's mention *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 119, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), at p. 22 of their Petition, suggesting remedies which could be afforded plaintiffs in hypothetical cases involving longshoremen, maritime workers, passengers and users of jet skis. Their reliance on *Yamaha* is misplaced. *Yamaha* holds that DOHSA does not displace state law for non-seafarers in territorial waters. *Id.* 516 U.S. at 215-216, 116 S. Ct. at 628. *Yamaha* did not overrule *Miles* nor did it make any inroads into uniformity because in *Yamaha*, this court reiterated a basic principle, i.e., that uniformity is required when the plaintiff is a seaman. *Id.* 516 U.S. at 215, 216, 116 S. Ct. at 628. Simply put, *Yamaha* lends no support to Petitioners as it reflects this Court's

appropriate distinction between the remedies afforded classes of claimants to which Congress has spoken and those to which Congress has not.

The petitioners offer hypotheticals in an attempt to question whether the principles of uniformity are an illusion but fail to recognize that each class of plaintiffs must base their action on the specific facts presented. The uniformity mandated in *Miles* pertains to wrongful death actions governed by the Jones Act, DOHSA, and general maritime law. It is unnecessary to go beyond the facts of this case to decide the issue presented because it does not involve a little girl on a jet ski in territorial waters, or a longshoreman's claim, or the claims of a passenger on a cruise ship. It is unnecessary for this court to address these hypotheticals and provide an unnecessary advisory opinion. Here, *Miles* and uniformity apply to petitioners because the factual setting of this case is the wrongful death of a Jones Act seaman which is governed by the Jones Act and general maritime law.

Two federal circuits have addressed the specific issue presented before the court. While petitioners correctly note that there is some conflict between various district courts on the issue presented, there is no conflict within the federal appellate circuits with regard to the precise issue raised herein. In *Davis v. Bender Shipbuilding and Repair Co., Inc.*, 27 F.3d 426 (9th Cir. 1994), *cert. denied*, 513 U.S. 1000, 115 S. Ct. 510, 130 L. Ed. 2d 418 (1994), the court addressed the issue of remedies as to the non-employer

defendant shipbuilder in an action brought by the estates of a Jones Act seaman.[5]

The *Davis* court addressed a specific issue of whether the estate could recover lost future earnings from a non-employer defendant, and held that *Miles* applied with equal weight as to both employer and non-employer defendants. In *Davis*, the estates of seamen who drowned on the high seas sought to recover damages for lost future earnings from a non-employer defendant. The claims against the employer were settled prior to bringing suit against the shipbuilder defendant. The *Davis* court recognized that the decision in their case was controlled by *Miles*. The court specifically noted that neither the Jones Act, nor DOHSA permitted the recovery of the damages sought, and the court therefore was precluded from awarding non-pecuniary damages under general maritime law. *Id.* at 430.

It is significant that the plaintiffs in *Davis* attempted to distinguish their case from *Miles* by emphasizing that the defendant shipbuilder was not a Jones Act defendant. In response, the *Davis* court responded:

> . . . moreover, the principle underlying the Supreme Court's decision in both *Miles* and *Moragne*, is that general maritime law is intended to supplement the statutory remedies created by Congress, not to enhance or replace them. *Miles* instructs the lower federal courts that a claim for lost future earnings is not available in connection

[5] It is noted that the Court of Appeals in this matter recognized and approved the decision in *Davis*. *Scarborough v. Clemco Industries*, 391 F.3d 660, 668 (5th Cir. 2004) (App. p. 16). Petitioners have failed to cite and discuss the *Davis* case in their writ application.

> with a maritime death for which Congress has already provided a remedy and has excluded such damages. The identity of the defendant is irrelevant to these considerations. *Id.* at 430.

In reaching its decision in the case at bar, the Fifth Circuit concluded that:

> It would be improper for this court to allow the surviving spouse and heirs of a Jones Act seaman to recover non-pecuniary damages in this case when Congress has disallowed the recovery of identical damages in a Jones Act suit. The genesis of appellants' claims is maritime through and through. *Miles* plainly limits recovery to pecuniary damages. We will not retreat from the bright directive of *Miles*. The *Miles* opinion is concerned with uniformity in the damages recoverable by a Jones Act seaman, and his survivors, not with uniformity of the types of damages to which various defendants are subjected. . . .
>
> For these reasons, the court finds that neither one who has invoked his Jones Act seaman status, nor his survivors may recover non-pecuniary damages from non-employer third parties. *Scarborough v. Clemco Industries*, 391 F.3d 660, 668 (5th Cir. 2004). (App. p. 16).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 18 2005
OFFICE OF THE CLERK

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF PULMOSAN SAFETY EQUIPMENT COMPANY TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Should *certiorari* be granted to review the decision of the Fifth Circuit, which followed the guidance and rationale of *Miles v. Apex Marine*, 498 U.S. 19, 111 S.Ct. 317 (1990) to maintain uniformity between general maritime law and the Jones Act and DOHSA by limiting the recovery for wrongful death of a Jones Act seaman to pecuniary damages as against all makers of defective vessel equipment or appurtenances, particularly where there is no conflict among the circuits on the issue?

CERTIFICATE PURSUANT TO RULE 24

The undersigned counsel of record for Appellee, Pulmosan Safety Equipment Company, identifies all of the parties appearing here and before the United States Court of Appeals for the Fifth Circuit, and who now have an interest in the outcome of this case:

Barbara Scarborough
Rhonda Scarborough Halterlein
William Scarborough, Jr., petitioners
Clemco Industries, Inc., (no subsidiaries)
Pulmosan Safety Equipment Company
(has no subsidiaries)
Century Indemnity Company, as successor to
CCI Insurance Company, as successor to Insurance
Company of North America, as respondents

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeal is reported at 391 F.3d 660 and is reprinted in petitioner's appendix at App. 1. The district court's opinion is reported at 264 F.Supp.2d 437, and is reprinted in petitioner's appendix at App. 17.

JURISDICTION

Respondent does not contest the existence of jurisdiction of this Court to *consider* the petition for writ of *certiorari* pursuant to 28 U.S.C. § 1254(1), the petition having been filed on February 17, 2005, within 90 days of the entry of the judgment and opinion by the Fifth Circuit Court of Appeals on November 18, 2004.

STATUTORY PROVISIONS INVOLVED

The Jones Act, 46 U.S.C. § 688, is reprinted in petitioner's appendix at App. 65. In addition, also involved are portions of the Death on the High Seas Act, *to-wit*: 46 U.S.C. App. § 761(a), providing for a cause of action under The Death on the High Seas Act, states in pertinent part as follows:

> Subject to subsection (b), whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts

> of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. App § 762, addressing types of damages recoverable under the Death on the High Seas Act, states in pertinent part:

> (a) The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.
>
> (b)(1) If the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of any state, or the District of Columbia, or the Territories or dependencies of the United States, additional compensation for nonpecuniary damages for wrongful death of a decedent is recoverable. Punitive damages are not recoverable.

STATEMENT OF THE CASE

The instant wrongful death suit flowed from the same pulmonary injuries that were the subject of the suit filed by plaintiffs' decedent in the Eastern District of Louisiana on August 15, 1977. There, William Scarborough had filed a "Seaman's Complaint" against a set of defendants, including makers of vessel equipment/appurtenances,

Pulmosan and Clemco, alleging their blasting ricochet hoods made the vessel unseaworthy, and whose selection for use in accomplishing the vessel function constituted negligence of the Jones Act employer.

The personal injury case of Mr. Scarborough was tried before a jury to a large verdict that included Scarborough's past and future pain and suffering and lost future lifetime wages, which was entered by way of judgment dated June 18, 1981. The jury found Scarborough to be a seaman, the vessel's equipment/appurtenances defective such to render the vessel unseaworthy, and found the Jones Act Employers 60% at fault, Clemco 23% and Pulmosan 17%.

Mr. Scarborough died on March 21, 2002. His three survivors, his wife and two major children, sued for wrongful death in the same district court on January 10, 2003. They specifically alleged collateral estoppel applied against defendants, and that the death was a result of the progression of the disease solely caused by the pulmonary exposures occasioned by his work aboard the CC/L&M vessels. Aware of the limits of maritime remedies, plaintiffs intentionally pled diversity jurisdiction in a studied attempt to avoid the application of maritime law and the result suggested by the *ratio decidendi* of *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). On March 10, 2003, plaintiffs moved for a summary judgment on the issue of liability, citing offensive collateral estoppel based on the 1981 verdict. Defendants, Clemco and Pulmosan, and their alleged insurers, also moved for partial summary judgment to obtain a ruling that plaintiffs' claims were limited to pecuniary damages only.

The district court, after substantial briefing and oral argument, entered an order, reported at 264 F.Supp.2d 437 (E.D. La. 2003) (Petitioner's App. 17), which ruled that defendants were correct on the issue of plaintiffs being limited to pecuniary damages for a seaman death action, even against non-employers.

Judge Berrigan ruled that plaintiffs' decedent had been found to be a Jones Act seaman, and that the record showed plaintiffs had vigorously and successfully argued for that status, as well as for recovery under unseaworthiness on account of the Clemco/Pulmosan hoods being essential appliances or appurtenances of the vessels. The District Court dug through the record and correctly noted that:

> "The Final Pre-Trial Order confirms that the factual basis for all claims made against all defendants in *Scarborough I*, including the factual basis for the claims of unseaworthiness against the vessel owners was the 'inadequate and deficient tools, supplies, appliances, and equipment, and manned by improperly trained, deficient, and inadequate officers and crew,' specifically that equipment manufactured and supplied by Pulmosan and Clemco. (*Scarborough I* Rec.Doc. 457, Final Pre-Trial Order at 11-12)."

264 F.Supp.2d at 444, Petitioner's App. at 31.

Judge Berrigan, as affirmed by the Fifth Circuit, also found that maritime jurisdiction and law would properly apply today as to the equipment/appurtenances at issue, a ruling plaintiffs have not sought to have reviewed by this Court and which is now final. As such, general maritime law would provide the available remedies which should be construed to exclude non-pecuniary damages for wrongful

death claims of the seaman's family under a fair reading and application of the principles that were articulated by this Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

The Court of Appeals, Fifth Circuit, reviewed the matter under a *de novo* standard and affirmed. 391 F.3d 660 (5th Cir. 2004). The Court reasoned that the Jones Act and the Death on The High Seas Act ("DOHSA"), 46 U.S.C. App. § 761-762 were "highly analogous" to the factual scenario of this case, as to which the courts should take cognizance in deciding the contours of the general maritime law. 391 F.3d at 668; Petitioner's App. at 15-16. The Fifth Circuit also found that uniformity could and should be maintained here between the Jones Act and GML wrongful death recoveries. *Id.*

The Fifth Circuit's ruling herein was consistent with the other circuit court of appeal that has addressed the issue, so there is absolutely no split among the circuits. *See Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 430 (9th Cir.), *cert. denied*, 513 U.S. 1000 (1994). In addition, the court in *Preston v. Franz*, 11 F.3d 357, 358 (2nd Cir. 1993), and *Wahlstrom v. Kawasaki Heavy Industry, Ltd.*, 4 F.3d 1084, 1089 (2nd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994) ruled that the policies favoring limiting wrongful death recoveries to pecuniary damages that were evinced by Congress in the Jones Act and DOHSA are not strictly confined to the four corners of the acts. Their approach and rationale are consistent with the decisions of the Fifth and Ninth Circuit Courts of Appeal.

STATEMENT OF FACTS

From 1959-1967, Mr. Scarborough had been assigned to a series of raked-bow vessels whose primary function was navigate to and abrasive blast various structures located far out in the Gulf of Mexico. Under his own counsel's questioning, Mr. Scarborough testified as to his assignment to several such vessels in the Coastal Coatings/Land & Marine ("CC/L&M") fleet, on which he slept, took meals, assisted in navigation, relief-captained, moored, unloaded and loaded, and operated equipment permanently affixed to the vessels that was always used to carry out its mission while plying navigable waters. Scarborough's seaman's work was done primarily on the high seas, beyond the territorial waters of Louisiana. *See* 391 F.3d at 666, Petitioner's App. at 12. Mr. Scarborough's function always involved being on or connected to the vessels, as "everything came from the boat." His work and use of hoods was integral to the mission and function of the vessel.

In connection with his work as a seaman completing the function of these vessels during the years 1959 to 1967, Mr. Scarborough inhaled silica and other dusts, injured his lungs and developed silicosis. He sued as a Jones Act seaman in 1977, via his "Seaman's Complaint."

The connection of Clemco's and Pulmosan's hoods as essential vessel appliances or appurtenances can be found in the pretrial order referred to in the district court's decision, 264 F.Supp. at 44; Petitioner's App. at 31, where plaintiff stated:

> Plaintiff, while employed as a sandblaster painter by defendant, Coating Specialists, Inc., for the period 1959 through the third quarter of

1963, and by defendant, Land & Marine Applicators, Inc., from the third quarter of 1963 through the second quarter of 1967 worked aboard various vessels owned and operated by his employers as a seaman and a member of the crew.

* * *

During the aforesaid years plaintiff, as a consequence of the negligence of his employers and the unseaworthiness of his vessels, contracted silicosis as a result of injury by disease, or both. Plaintiff contends that his employers' vessels were unseaworthy in that they were equipped with inadequate and deficient tools, supplies, appliances and equipment, and manned by improperly trained, deficient and inadequate officers and crew. The plaintiff further contends that the aforesaid vessels were unseaworthy in that the crew members, such as plaintiff, were knowingly required to work under hazardous, dangerous and unsafe conditions aboard unsound vessels.

Finally, plaintiff contends that his aforesaid employers were negligent in failing to provide him with a safe place to work, safe equipment, proper equipment, adequate instructions, and adequate supervision, because he knew, or by the exercise of reasonable care, should have known, of the hazards involved in sandblasting, particularly that of contracting silicosis, and failed to warn plaintiff of the danger thereof or provide him with known and adequate equipment and materials that would have prevented the occurrence thereof

* * *

> [Defendants] knew, or by the exercise of reasonable care that the equipment being furnished to plaintiff was not adequate to protect him from the danger of contracting silicosis.

Based on Mr. Scarborough's extensive testimony as to his assignment to the defendants' vessels, his use of appurtenances (made by defendants) as an integral part of his performing the core function of the vessels, as well as his handling of navigation and mooring duties, the jury answered "yes," to specific interrogatories that Mr. Scarborough was a seaman, that his seaman work caused his injuries, that the hoods were deficient and the vessels were unseaworthy and that the employers were negligent for using them on board. A very large sum (for 1981) was awarded for the permanent disability of and injury to Mr. Scarborough, thus covering all future support of his family, and for Scarborough's pain and suffering until death.

Mr. Scarborough died on March 21, 2002, thus creating a new cause of action for wrongful death to be assessed under maritime law, which is the subject of this proceeding.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The decision of the Fifth Circuit is consistent with the decisions by the other circuit court which has addressed the issue. *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 430 (9th Cir.), *cert. denied*, 513 U.S. 1000 (1994). In addition, the court in *Preston v. Franz*, 11 F.3d 357, 358 (2nd Cir. 1993) (the policies of the Jones Act and DOHSA in eliminating non-pecuniary damages for wrongful death

provide guidance as to the construction of general maritime law, even if the statutes do not specifically apply to the claim) and *Wahlstrom v. Kawasaki Heavy Industry, Ltd.*, 4 F.3d 1084, 1089 (2nd Cir. 1993) *cert. denied*, 510 U.S. 1114 (1994) ruled consistently with the rationale used by the Fifth Circuit here. Thus, there is no conflict among the circuits that would justify expenditure of this Court's precious resources to resolve.

Additionally, the ruling below is entirely consistent with This Court's reasoning and holding in *Miles v. Apex Marine*, 498 U.S. 19 (1990), that general maritime law should be construed to be consistent with Congressional policies to limit wrongful death recoveries to pecuniary damages in wrongful death, which are clearly expressed in both the Jones Act and the Death on the High Seas Act ("DOHSA"), the latter of which was amended in 2000, retaining the application of the non-pecuniary limitations in the maritime realm, while discarding it as to "commercial aviation accidents."

ARGUMENT

The *Miles* Principle

In *Miles*, *supra*, This Court firmly resolved to adopt a uniform matrix of remedies for seamen wrongful death, regardless of location of the casualty or the grounding in Jones Act, DOHSA, or GML liability, and concluded:

> We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

* * *

> Today we restore a uniform rule applicable to **all actions** for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

498 U.S. at 32-33, 111 S.Ct. at 326 (emphasis supplied).

Plaintiffs' petition seeks a holding that this Court in *Miles* evinced no broad policies, and, further, that there is no connection or "overlap" between maritime law and the Jones Act. If that were the case, this Court would not have taken the pains to refer to the absence of non-pecuniary damage in DOHSA, as well as in the Jones Act. 498 U.S. at 29-30, 111 S.Ct. at 324. Additionally, one of the defendants in *Miles* was a non-employer who had supplied the worker who ended up attacking the plaintiff on board the vessel. The limiting of recoverable damages to pecuniary losses was applied to all of the defendants. Moreover, by 1990, uniformity was not a novel issue[1] likely to prompt gratuitous comments or reference by this Court to any law other than the Jones Act, unless a broader concept was being articulated as to seaman death remedies.

This Court in *Miles* also would have had no need to discuss uniformity of general maritime law if it were confining its uniformity policy just to the four corners of the Jones Act, *e.g.*, only against the Jones Act employer. The Congressional statutory *policy* of excluding non-pecuniary damages in *several* statutes was found relevant to defining consistent contours for seamen remedies in general maritime law. And the GML, unlike in 1977 when Judge Heebe handled *Scarborough*, now encompasses

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[1] *E.g.*, *Mobil Oil v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d. 581 (1978).

products liability. *East River Steamship Corp. v. Transamerica Delaval*, 476 U.S. 858, 106 S.Ct. 2295 (1986). It is logical for the general maritime law to be construed consistent with the policies evinced by Congress in statutory laws, particularly where the same limitation appears both in a seaman statute (the Jones Act) *and* in one not limited to seamen, but which covers navigation on the high seas (DOHSA).

In 2000, Congress revisited the pecuniary damages limitation and chose to lift it only as to "commercial aviation accidents occurring on the high seas beyond 12 nautical miles from the shore of any State . . . " *See* Pub. L. 106-181, April 5, 2000. In so doing, Congress ratified, in very modern times, its intent to limit damages for wrongful death due to marine injuries to those pecuniary in nature. Thus, the rationale of *Miles* has even more statutory support now than existed when it was decided in 1990.

This Court has, in the past, looked to the Jones Act for guidance in contouring the general maritime law, with an eye to maintaining uniformity. For example, in *Miles*, 498 U.S. at 23-24, 111 S.Ct. at 321, the Court noted the recognition in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 388, 90 S.Ct. 1772, 1781, 26 L.Ed.2d 339 (1970) that the Jones Act and DOHSA both evinced a policy favoring the existence of a wrongful death action for deaths occurring in territorial waters and on the high seas. The desire by Congress for uniformity as a reason for enacting DOHSA was also noted by this Court. 498 U.S. at 26, 111 S.Ct. at 322.

Petitioners' argument that no particular act of Congress totally cabins maritime product liability misses the

whole thrust of *Miles*' instruction that the courts not interpret general maritime law in a way inconsistent with Congressional statutory policy evinced in an *area*, such as seamen's death remedies, where Congress *has* legislated. The very logic of avoiding judge-made dissonance between the general maritime law and Congressional policies gleaned from the few statutes that Congress had enacted applicable to analogous claims, strongly suggests that the decision below is a correct one. Maintaining uniformity as to allowable damages for the wrongful death of a Jones Act seaman is a valuable and worthwhile policy that should not be jettisoned, just to maximize recovery by Scarborough's heirs in this case.

Petitioner speaks of passengers having different rights. Passengers are part of a different class of claimants, who, like others, have different levels of proofs – higher than those of a seaman. They, unlike seamen, do not have maintenance and cure, or absolute liability via an unseaworthiness claim. To cite differences between a passenger and a seaman is utterly unhelpful to the issue at hand. The logical implication of petitioner's argument is that uniformity should be jettisoned in *each* case, just because 100% uniformity between all classes of claimants does not exist. This is hardly in line with this Court's policy of achieving uniformity between the GML and certain classes of claimants for wrongful death where Congress has evinced limitations like those in the Jones Act and DOHSA. Petitioner's logic, if accepted, implicitly suggests that this Court's entire exercise in *Miles* was useless, hardly the stuff deserving further review by this Court.

Petitioners' "compare and despair" arguments and strained hypotheticals bearing no semblance to the facts of

this case, lack useful analytical substance or relevance herein. Between *classes* of potential plaintiffs, *e.g.*, passengers or longshoremen versus seaman, there can and will be differences in recoveries. There also are differences of result within a given class, based on the peculiar facts, *e.g.*, some seaman survivors being dependent upon the decedent and some not. That is how the cookie crumbles in life and so in law. Those who are dependent receive large pecuniary recoveries, as did Ms. Scarborough indirectly through Mr. Scarborough's large loss-of-lifetime-earnings recovery in 1981. If there are no dependents, then heirs may receive little or no recovery as the result of a seaman death. If a seaman is instantly killed, there is no maintenance and cure. If he lives, there is. But to say that different facts relating to damages means maritime law should not be uniform as to types of allowable seaman death damages is a *non-sequitur*, and certainly contrary to Congress' established policy as interpreted by this Court in an unmistakable series of cases, including *Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978) and *Miles*, 498 U.S. at 31-37, 111 S.Ct. at 325-28 (1990).

Petitioners cite "special solicitude for seamen" as a whole-cloth substitute for the analysis and rationale articulated in this Court's decision in *Miles v. Apex Marine*, 498 U.S. 19, 111 S.Ct. 317 (1990). However, the solicitude for seamen and non-pecuniary wrongful death damages, as the district court aptly reasoned, were factored in by Congress in the Jones Act, and, "Congress felt non-pecuniary wrongful death damages were properly forfeited in exchange for the privilege that seaman's status wrought." *See* district court opinion found at Petitioner's. App. at 35.

Indeed, in the whole equation, seamen still do quite well in terms of remedies. The worker's compensation exclusive remedy does not exist, there is an easier burden of proof, and the seamen themselves as did Scarborough here, obtain full compensatory damages for their own injuries, including pain and suffering and lifetime earnings losses, with only their families being restricted to non-pecuniary damages in the event of a wrongful death. In addition, the seamen have the benefit of absolute liability under the unseaworthiness doctrine. *See, e.g., Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941 (1960).

The "trade-off" petitioner articulates is far too narrow and fails to consider the entire scheme of recovery available to seamen that results, on the whole, with seamen being treated more than fairly, even as the courts respect the policies evident in the Congressional acts and preserving uniformity by construing general maritime law consistently with those statutory policies. Uniformity is preserved by limiting seaman's family's wrongful death recoveries to pecuniary damages, consistent with the Jones Act and DOHSA statutory schemes. The seaman himself lost nothing here in terms of his own damages. He received both pecuniary and non-pecuniary damages. Virtually no other workers enjoy such privileges, so the "solicitude for seamen" is truly a straw issue and unhelpful as a decisional tool or guide for analysis here.

Seeing to the uniformity of wrongful death (pecuniary) damages under the general maritime law with those of the Jones Act *and* DOHSA remedies for wrongful death is logical, consistent and fair. The seaman himself receives full recoveries, as did Mr. Scarborough here. That his survivors, all of majority, received only pecuniary damages

is not unfair in the entire scheme of things. The result is entirely consistent with the Congressional limitations in such recoveries in the only statutes that address analogous claims. If it is fair for a seaman's family to be so limited as against the seaman's own employer, it is fair as against appurtenance makers. The contours of the general maritime law were properly set with the Jones Act and DOHSA in mind as to the *area* of wrongful death recoveries on behalf of a seaman. Congress' policy to limit marine wrongful death recoveries to pecuniary losses, as was originally expressed in those acts and as was recently reiterated by retaining these restrictions for maritime claims in the 2000 amendments to DOHSA, together, should not be ignored. The policy extends beyond the technical limits of the Jones Act, so it is not crucial that an equipment or appurtenance maker is not an employer under the Jones Act.

The citation of *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 119, 116 S.Ct. 619, 133 L.Ed. 578 (1996) was correctly disposed of by both of the lower courts, who observed that Calhoun was not a seaman and had no connection to seaman's work and perils. Recreational boating by a non-mariner with shallow-draft jet skis has nothing to do with the facts, class of claimant, or commercial maritime interests involved herein. Similarly, negligence of a vessel owner *vis-a-vis* a longshoreman (33 U.S.C. § 933) involves different classes of workers than seamen like Scarborough.

Congress has acted to address wrongful death on the high seas (where Scarborough worked and was injured) and for Jones Act seamen wherever they work. Together, this is clearly enough of a locus of policy under analogous circumstances to justify maintaining uniformity of the general maritime law by the courts to limit damages for

all wrongful deaths *of seamen*. The Fifth Circuit's position below was correct.

NO CONFLICT EXISTS AMONG THE CIRCUITS

Petitioners attempt to create the impression that there is a great conflict among the circuits on the issue; however, no other circuit court of appeal has disagreed with the Fifth Circuit. *See Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 430 (9th Cir.), *cert. denied*, 513 U.S. 1000 (1994). The *Davis* Court reasoned:

> The plaintiffs' attempt to distinguish this case from *Miles* by stressing that the defendant in this case is the shipbuilder, not a "Jones Act defendant." Yet there is nothing in *Miles*' reasoning to suggest that the decision turned upon the identity of the defendant. Indeed, not all of the defendants in *Miles* were Jones Act Employers. [111 S.Ct. at 319-20]. Moreover, the principle underlying the Supreme Court's decision in both *Miles* and *Moragne* is that the general maritime law is intended to supplement the statutory remedies created by Congress, not to enhance or replace them. *Miles* instructs the lower federal courts that a claim for lost future earnings is not available in connection with a maritime death for which Congress has already provided a remedy and has excluded such damages. The identity of the defendant is irrelevant to these considerations.

The Second Circuit, in *Preston v. Franz*, 11 F.3d 357, 358 (2nd Cir. 1993) and *Wahlstrom v. Kawasaki Heavy Industry, Ltd.*, 4 F.3d 1084, 1089 (2nd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994) agreed with the principle that

the recognition of the pecuniary damages policy suggested by the Jones Act and DOHSA is not limited to the four corners of those acts.

That district courts, almost all within the Fifth Circuit, have expressed differing opinions on the issue, is now moot given the Fifth Circuit's ruling. It is utterly premature to suggest that this Court's supervisory jurisdiction is needed here and now, as every circuit court to address the issue so far has ruled the same way. They all have been true to the principles and reasoning of this Court in *Miles*.

CONCLUSION

The petition for the grant of a writ of *certiorari* should be denied.

Respectfully submitted,

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